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Section 1983: Doctrinal Foundations and an Empirical Study

Theodore Eisenberg*

The Supreme Court's treatment of official liability is under attack. Some believe that decisions interpreting the centerpiece of the official liability system—section 1983¹—have been too protective of government officials and entities.² Others argue that the Court has overexposed governments or officials to liability.³ Still others detect difficulty in the area without pronouncing whether the Court has gone too far or not far enough.⁴ The Court itself regularly divides over issues concerning the scope of section 1983.⁵

To some degree this tension is unavoidable. Several factors combine to ensure that the course of modern civil rights doctrine will not be

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¹ Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (Supp. IV 1980).

² E.g., Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1174-84, 1188 (1981) (decisions too protective of governmental entities); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977) (decisions too protective of both government officials and governmental entities); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 286 (decisions too protective of governmental entities).

³ E.g., Cass, *supra* note 2, at 1153-74, 1187 (too much opportunity for adversely affecting official behavior); Schuck, *supra* note 2, at 285 (individual officials too vulnerable to liability).

⁴ E.g., Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8 (1978). For the view that the Court has dealt with the problem as well as may be expected, see Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URBAN LAW. 1 (1981).

⁵ E.g., *Owen v. City of Independence*, 445 U.S. 622 (1980) (5-4 decision); *Butz v. Economou*, 438 U.S. 478 (1978) (5-4 decision); *Stump v. Sparkman*, 435 U.S. 349 (1978) (5-3 decision).

smooth. Rapid expansion of constitutional guarantees inevitably strains a provision that associates a private damages action with each new constitutional right. Section 1983's coverage of state officials places it in the middle of the continuing clash over the proper powers of the state and federal governments. And Congress has provided the Court with virtually no assistance on section 1983 issues. Indeed, Congress's nineteenth century "technical" tinkering with what is now section 1983 generated problems that the Court only recently has faced.⁶

If the Court's section 1983 decisions are not entirely to blame for difficulties that attend the section, they are not free from fault. Since its early important interpretations of section 1983 in *Tenney v. Brandhove*⁷ and *Monroe v. Pape*,⁸ the Court has provided incomplete, weakly reasoned, or otherwise questionable opinions. At a general level, the Court has not acknowledged that there are at least two competing visions of section 1983. In one perspective, section 1983 addresses a limited historical problem in post-Civil War race relations. In another, it is the primary civil mechanism for vindicating all constitutional rights. These two visions do not always lead to consistent results. At the doctrinal level, *Tenney* initiated a pattern of mechanical invocation of pre-section 1983 immunity doctrine in section 1983 cases without considering the historical and political circumstances that differentiate official liability under section 1983 from prior patterns of official liability. *Monroe* tortured section 1983's legislative history so severely that the section has yet to recover.

Past weaknesses in the Court's treatment of section 1983 cases, however, may pale in comparison to present weaknesses in the Court's understanding. Its decisions to date suggest an inadequate grasp of the past; some current Justices' premises reflect an incomplete understanding of the present. Recent opinions and other writings suggest that some Justices wish both to limit the number of section 1983 cases and to direct as many of them as possible to state courts.⁹ Much of the impetus underlying this trend comes from a widespread perception that section 1983 cases are overwhelming the federal courts.

This Article addresses both past and present weaknesses in the Court's section 1983 jurisprudence. Part I focuses on the Court's past, direct contributions to confusion about section 1983. It is a limited endeavor, emphasizing how section 1983 doctrine arrived at its current state rather than how an ideal law of official liability should read. Iden-

⁶ See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1983 covers actions based on federal statutes, a coverage added to § 1983 in 1874); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (assessing scope of § 1983's jurisdictional counterpart, 28 U.S.C. § 1343(a)(3) (Supp. IV 1980), from which it was separated in 1874).

⁷ 341 U.S. 367 (1951).

⁸ 365 U.S. 167 (1961).

⁹ See notes 164-65 and accompanying text *infra*.

tifiable weaknesses in current section 1983 doctrine have limited the scope of section 1983 analysis, and have caused the Court and some of its critics to ignore relevant factors and to consider too narrow a range of choices in section 1983 decisionmaking. Tracing the sources of these weaknesses is an important first step toward rethinking the federal civil rights program.

Part II examines the present realities of section 1983 litigation, discussing the results of an empirical study that I conducted of all section 1983 cases filed over a two year period in the Central District of California, which includes Los Angeles. To the extent that the Court bases decisions on perceptions about section 1983's operation, it should have an accurate picture of how the section works. If my study of section 1983 cases reflects the national experience, the Court and many commentators share false impressions about the nature and burden of section 1983 litigation. For example, section 1983 cases are not overwhelming the federal courts; trivial claims, involving little if any federal policy, do not dominate district court dockets, and courts are not, at the behest of state prisoners, eagerly overseeing minute details of prison life. The results of the study do suggest that real problems exist in section 1983 litigation. But they are not of a kind that warrant restricting either section 1983 or the Constitution.

I

THE SOURCES OF CONFUSION IN SECTION 1983 DOCTRINE

A. *Competing Conceptions of Section 1983*

For the purposes of this discussion, it is helpful to set out two plausible visions of how section 1983 might work. The two visions by no means exhaust the universe of possible views of section 1983—they are offered here merely as reference points. An ideal approach to section 1983 might employ features of both views or some completely different view. Nevertheless, developing a framework against which to assess recent section 1983 cases is warranted, particularly because some of the case-law tensions noted below may be seen as manifestations of these competing visions of section 1983.

The first vision of section 1983, which I will call "historical," draws heavily on the social forces that generated its original enactment. Section 1983 was first enacted as section 1 of the Civil Rights Act of 1871, which attempted to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters. Representative Perry eloquently summarized the problem that Congress addressed:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act

as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.¹⁰

Against this background, the 1871 Act provided in section 1 (now section 1983) for civil actions against those who under color of state law deprived persons of their constitutional rights.¹¹ Section 2 of the Act consisted of two sentences of complexity and length that would do a modern Internal Revenue Code draftsman proud. It provided for civil and criminal sanctions against public and private conspiracies to: (1) challenge federal authority, (2) deprive persons "of the equal protection of the laws, or of equal privileges or immunities under the laws," or (3) prevent states from protecting persons against deprivations of their rights.¹² Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with Klan or other violence. Among other things, sections 3 and 4 also deemed state complicity with anti-federal combinations to be "rebellion against the government of the United States," with a resulting suspension of the writ of habeas corpus.¹³ The Act was strong medicine.

The historical vision supports two principal conclusions. First, the entire Act of which section 1983 was a part addressed an enormously important, but nevertheless limited, problem. Racial attitudes in the South, blossoming in the form of Klan and other violence, and the failure of the states to cope with that violence, prompted its enactment. Any application of section 1983 beyond the confines of racial problems must seek justification in something more than the intent of section 1983's framers. A case may be made for such extensions, but they are beyond the core concerns underlying section 1983's enactment.

Second, although the 1871 Act dealt with a limited problem, its history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations. The problem manifested itself at all levels of society and in all official circles; no traditional remedy would have sufficed. The 1871 Act penetrated the problem as deeply as Congress knew how to penetrate any problem by legislation. Traditional immunities, respect for states, and other basic assumptions were minimized in Congress's eagerness to deal with the problem in the South.¹⁴ Thus, the historical perspective also

¹⁰ CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871).

¹¹ Civil Rights Act of 1871, § 1, 17 Stat. 13.

¹² *Id.* § 2.

¹³ *Id.* §§ 3-4.

¹⁴ See note 53 and accompanying text *infra*.

suggests that those who would limit section 1983's ability to protect the rights it was meant to protect must seek justification in something other than the intent of section 1983's drafters.

To illustrate, from this historical perspective one may question the Court's suggestion in *Quern v. Jordan*¹⁵ that section 1983 left unaffected the immunity of states from suit because Congress would not have lightly overturned such a tradition. Not only did the misbehavior of states play a prominent role in prompting enactment of section 1983 but, in the same act, Congress was willing to deem state complicity with the Klan to be "rebellion against the government of the United States" and to back that declaration with authorization to use federal force.¹⁶ What more can Congress do to a state? By comparison, civil liability for states, which section 1983 literally encompasses, is child's play. To say that the 1871 Congress would have thought twice about the federalism implications of civil liability for states is to scorn reality.

In contrast to the historical approach, one may view section 1983 as the general federal remedy for violations of all constitutional rights. The Court has toyed with intermediate approaches under which section 1983 protects only "civil" rights¹⁷ or only "personal" rights,¹⁸ but these never have come to represent a coherent approach to the section. If not confined by its origins, section 1983 seems destined to protect all constitutional rights. There is little startling about having such a remedy. We think nothing of remedying private wrongs through tort law. Vindicating constitutional rights through a federal cause of action seems a mild step. Under this view, if section 1983 did not exist, we would have had to invent it. And in the one crucial area to which section 1983 does not reach—actions against federal officials—the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹⁹ constituted just such an invention.

This second approach to section 1983, which I will call "functional," raises important questions about the depth to which section 1983 will penetrate the expanded set of rights that it is viewed as covering. The historical approach yields a narrow set of rights as the focus of

¹⁵ 440 U.S. 332, 338-45 (1979).

¹⁶ Civil Rights Act of 1871, § 4, 17 Stat. 13.

¹⁷ *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900). See also *Giles v. Harris*, 189 U.S. 475, 485 (1903) (suggesting possible distinction between § 1983's coverage of actions under authority of state constitutions and actions under authority of inferior sources of state law).

¹⁸ Cf. *Hague v. CIO*, 307 U.S. 496, 531-32 (1939) (opinion of Stone, J.) (limiting scope of § 1983's jurisdictional counterpart to nonproperty rights). But cf. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 542 (1972) (rejecting Justice Stone's approach). In *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), the Court refused to limit § 1983 to misbehavior by defendants with a culpable state of mind, thus probably precluding limiting § 1983 to cases of egregious misbehavior.

¹⁹ 403 U.S. 388 (1971). The *Bivens* Court found a § 1983-type action to be inherent in the Constitution.

section 1983, but it offers a plausible basis for claiming that the section mercilessly penetrates abridgments of those rights. The functional approach expands section 1983's scope to cover all constitutional rights, but can it do so without a loss of the depth to which section 1983 may reach in protecting those rights? Perhaps more importantly, may section 1983 be given a broad functional scope, applied to many rights, without losing penetration within its core area of historical concern?

Examining *Quern v. Jordan* again, once section 1983 is viewed as encompassing all constitutional rights, it becomes more plausible for the Court to announce that section 1983 does not upset traditional state privileges. The nation has never had the depth of commitment to vindicating all constitutional rights that the 1871 Congress had to vindicating an important subcategory of those rights. *Quern* also demonstrates that rules announced in one section 1983 case, in this case a rule against suing states, may be stated with sufficient generality to limit recoveries in cases closer to section 1983's core historical concerns.

B. *Tensions in the Case Law*

By any standard, there are difficulties with the Court's law of public liability. Too much time has passed for the Court to rest much claim to legitimacy on the will of the Reconstruction Congresses that enacted and modified section 1983.²⁰ And the significant gap separating the desires of those Congresses from the Court's results would compromise any such claim.²¹ Nor can the Court find refuge by claiming to implement modern policy considerations. Its section 1983 jurisprudence exposes many officials and entities to liability without achieving either full compensation for victims of unlawful behavior or effective deterrence of misbehaving public officials.²² Instead, the Court is operating at the more mundane level of trying to keep its cases from conflicting with each other.

Municipal immunity cases are among the most visible instances of doctrinal confusion. In 1961, the Supreme Court in *Monroe v. Pape*²³ held that Congress had not meant to render municipalities liable under section 1983. In 1973, the Court seemed committed to this path when it held that even if state law allowed an action against a city, the action could not be brought under section 1983.²⁴ Yet by 1978, *Monell v. Department of Social Services*²⁵ held that *Monroe* was wrong; Congress had

²⁰ Section 1983 originally was § 1 of the Civil Rights Act of 1871. 17 Stat. 13.

²¹ See text accompanying notes 15-17 *supra*, 29-31 *infra*.

²² See Cass, *supra* note 2, at 187-88; Schuck, *supra* note 2, at 285, 339-45.

²³ 365 U.S. 167, 187-92 (1961).

²⁴ *Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973). Soon after *Moor*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) extended *Monroe*'s ban on suits against cities to include requests for injunctive relief. *Id.* at 511-13.

²⁵ 436 U.S. 658, 665, 688-89 (1978).

meant to subject cities to suit. In 1980, with all the fervor of a new convert, the Court held in *Owen v. City of Independence*²⁶ that cities may not rely on the good faith defense available to individual officials. Lest cities seem too vulnerable, however, *City of Newport v. Fact Concerts, Inc.*²⁷ held them immune from punitive damage awards. The Court claimed to ground each of these results in part on congressional will and history.

That same will and history has enabled the Court to draw some questionable lines in the area of state liability as well. The first line distinguishes the immunity of cities from that of states. The factors that have caused the Court to interpret section 1983 as having substantially changed municipal liability have played no role in determining the liability of states. In *Quern v. Jordan*,²⁸ the Court held that section 1983 will not support an award of damages against states because Congress could not have meant to change a doctrine as well established as a state's eleventh amendment immunity without a more explicit expression. Yet nothing in the statute or its history suggests such a distinction between its treatment of cities and states.

States are not totally insulated from section 1983 suits, however, for the Court has also drawn a line between damages awards against states and awards of attorneys' fees. Since *Hutto v. Finney*,²⁹ states have been liable for attorneys' fees in section 1983 cases. Thus, an individual may suffer grievous damages from constitutional misbehavior by a state; yet in an ensuing lawsuit for injunctive relief against the responsible state officials, the state's sovereignty, which precludes an award of damages against it, can be invaded by an order to pay the plaintiff's lawyer. Again, the Court tells us, this is simply Congress's will combined with the effect of the eleventh amendment.³⁰

The Court's individual immunity decisions have been less directly self-contradictory than its entity immunity decisions. Serious problems still exist, however, both with the Court's individual immunity decisions in the aggregate and with particular decisions. A hypothetical situation resembling the problems that prompted the enactment of section 1983 illustrates the difficulties on the aggregate level. Assume that in the 1870s a southern legislature, in defiance of the fourteenth amendment, enacts a criminal law that discriminates against Blacks. A state prosecutor charges a Black person with violating the law, knowing it to be unconstitutional. A state judge, who also knows better, sustains the statute and sentences the defendant to prison. Under prevailing section 1983 doctrine, legislators, judges, and prosecutors are absolutely immune

²⁶ 445 U.S. 622, 638 (1980).

²⁷ 453 U.S. 247, 258-71 (1981).

²⁸ 440 U.S. 332, 338-45 (1979).

²⁹ 437 U.S. 678 (1978).

³⁰ *Id.* at 696-98.

from suit.³¹ The victim has a cause of action only against a state officer who may have arrested him, and even this defendant may invoke a good faith defense.³² If, upon learning of the indictment, the person surrendered himself to the authorities (relying on his day in court for vindication), there would be no arresting officer and, therefore, no individual amenable to suit for whatever damages the statute, wrongful trial, and incarceration caused. On such facts, Congress must have meant section 1983 to provide greater relief.

If one shifts from the immunity system in the aggregate and examines one of its component parts, the picture does not brighten. One legislative immunity case, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,³³ threatens to allow legislative immunity to reach beyond its traditional boundaries and immunize a broad range of previously vulnerable official executive conduct. Similar problems infect the areas of judicial and prosecutorial immunity.³⁴

In legislative immunity cases, as in all cases that grant absolute immunity, the Court attempts to ground its holding in sound public policy. Defendants are immune, the Court tells us, because it is a good idea that they be so.³⁵ Courageous legislative decisionmaking requires an atmosphere uncomplicated by threats of personal liability.

The need for courageous public decisionmakers has a strong appeal—too strong. The argument undercuts much of the rest of the Court's public liability doctrine. Society needs fearless executive officials as much as it needs fearless judges and legislators. Yet executive officials enjoy no absolute immunity, and even well-intentioned behavior can lead to liability.³⁶ And if the possibility of being sued is viewed as too inhibiting for judges and legislators, surely potential criminal liability, which the Court has said survives,³⁷ raises serious questions. *Lake Country Estates* and other decisions highlight an essential problem in the Court's individual immunity doctrine: as a matter of policy, it is difficult to support immunity for one class of public officials and not another. The alternative, however, is to render all officials liable or no officials liable. The Court clearly will not choose the former course and the latter would make section 1983 meaningless.

The Court has generated other questionable results. Shortly after

³¹ *Imbler v. Pachtman*, 424 U.S. 409, 420-28 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 553-55 & n.9 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367, 372-79 (1951) (legislators).

³² *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 318 (1975).

³³ 440 U.S. 391, 402-06 (1979) (members of regional, interstate planning agency entitled to legislative immunity while acting in legislative capacity).

³⁴ *See, e.g.*, *Butz v. Economou*, 438 U.S. 478 (1978).

³⁵ *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

³⁶ *See* *Wood v. Strickland*, 420 U.S. 308 (1975) (public school officials).

³⁷ *United States v. Gillock*, 445 U.S. 360 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

*Maine v. Thiboutot*³⁸ held that "the plain language of the statute" precludes limiting section 1983's coverage to some subset of federal laws,³⁹ the Court decided two cases that suggested precisely such a limitation.⁴⁰ The Court also seems confused about the relationship between section 1983 and state law. On occasion it feels bound to apply state law to issues not expressly addressed by section 1983.⁴¹ More frequently, however, it invents a federal rule to fill such gaps.⁴² The Court seems blissfully unaware of its divergent practices.⁴³ State law remedies play a particularly confusing role. Sometimes, possible state law remedies are deemed not to influence the availability or scope of the federal remedy under section 1983.⁴⁴ Yet in other cases, the Court constructs significant barriers to effective federal relief on the premise that state law provides effective remedies.⁴⁵

The doctrinal disarray attending section 1983 transcends mere attitudes towards civil rights cases. The disarray does not necessarily imply that the Court is straining to undermine the federal civil rights program. Some flaws favor civil rights plaintiffs while others favor their likely targets. To identify some of the sources of the current confusion, it is

³⁸ 448 U.S. 1, 4 (1980).

³⁹ In *Thiboutot*, the question before the Court was "whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws." *Id.* at 4. Implicitly concluding that it should not be so limited, the Court stated: "Given that Congress attached no modifiers to the phrase, the plain language of the statute embraces respondents' claim that petitioners violated the Social Security Act." *Id.* After *Thiboutot*, it was reasonable to assume that § 1983 encompassed all federal statutory claims. See *Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 329 (1981) (statement of Prof. Brown) [hereinafter cited as *Hearings*]; *id.* at 344 (statement of Mr. Madden); *id.* at 370-71 (statement of Sen. Curran); Schuck, *supra* note 2, at 284. But see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 237 (Supp. 1981) (raising questions about the scope of *Thiboutot*); T. EISENBERG, *CIVIL RIGHTS LEGISLATION* 779, 829, 885 (1981) (same).

⁴⁰ In *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Court, relying on Justice Powell's dissenting opinion in *Thiboutot*, indicated that § 1983 would not provide a cause of action where a statute provides an exclusive remedy. *Id.* at 28. The Court in *Halderman* remanded the case in part for a determination of whether remedies contained in the Developmentally Disabled Assistance and Bill of Rights Act were meant to be exclusive. *Id.* at 30. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981), the Court went one step further and found that certain environmental laws were meant to supplant any remedy that otherwise would be available under § 1983.

⁴¹ *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (relying in part on 42 U.S.C. § 1988); *Robertson v. Wegmann*, 437 U.S. 584 (1978).

⁴² See Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1983*, 128 U. PA. L. REV. 499, 510-11 (1980).

⁴³ For a discussion of the Court's difficulty with this aspect of the role of state law in § 1983 cases, see generally Eisenberg, *supra* note 42.

⁴⁴ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 183 (1961); cf. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (non-§ 1983 action against federal officials).

⁴⁵ E.g., *Younger v. Harris*, 401 U.S. 37 (1971); cf. *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (availability of state remedies determines whether due process violations occurred).

helpful to look closely at the Court's reasoning in the opinions that set the tone for subsequent analysis. Most of the important attitudes and techniques that contribute to the current disorder are traceable to the Court's relatively early decisions in *Monroe v. Pape*⁴⁶ and *Tenney v. Brandhove*.⁴⁷

C. Tenney v. Brandhove

It is common to view *Monroe v. Pape*, which freed section 1983 of possible restrictive interpretations, as the modern foundation for section 1983 analysis. But ten years before *Monroe*, *Tenney v. Brandhove* initiated trends in section 1983 analysis that have been as influential as *Monroe* itself. Just as *Monroe* assured plaintiffs a cause of action for constitutional violations, *Tenney* laid the groundwork for assuring that actual recoveries in section 1983 cases would be relatively rare events. Taken together, *Tenney* and *Monroe* supply a prism through which one can analyze nearly the entire corpus of section 1983 doctrine. The decisions reveal the origins of the interwoven strands that constitute the modern law of constitutional remedy, as well as the sources of many of that law's problems. The opinions also outline the Court's overall approach to section 1983; they are implicit statements about the relative dominance of the historical and functional conceptions of section 1983 and the relationship between them.

Tenney arose out of a dispute between Brandhove and the California Senate Fact-Finding Committee on Un-American Activities, which was chaired by Senator Tenney. Brandhove was conducting a campaign against Tenney's Committee, charging it with using smear tactics. When Tenney's committee summoned Brandhove to appear before it at a hearing, Brandhove appeared but refused to testify. A state court prosecution of Brandhove for contempt failed. Brandhove later brought a federal civil rights damages action against the Committee and its members, alleging that the hearing was not held for a legislative purpose but was initiated to intimidate Brandhove and deprive him of numerous constitutional rights.⁴⁸

The Court held that section 1983 does not abrogate the traditional immunity of state legislators from suit. After reviewing parliamentary, federal, and state versions of legislative immunity, Justice Frankfurter's opinion for the Court asked whether "Congress by the general language of its 1871 statute" meant to overturn the longstanding tradition of legislative immunity.⁴⁹ He noted that the immunity was for the public

⁴⁶ 365 U.S. 167 (1961).

⁴⁷ 341 U.S. 367 (1951).

⁴⁸ *Id.* at 370-71 (alleging, *inter alia*, deprivation of equal protection and first amendment rights, due process violations, and loss of equal privileges and immunities as a U.S. citizen).

⁴⁹ *Id.* at 376.

good and that it encouraged courageous behavior by legislators, and he concluded that Congress would not "impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of section 1983.⁵⁰ In apparent reliance on principles of federalism, Justice Frankfurter also expressed doubt about both the power of Congress to impose civil liability upon state legislators and the wisdom of doing so.⁵¹

Tenney's doctrinal analysis is an important source of difficulty in section 1983 litigation. It neglects both the language and the political and historical context of section 1983. The opinion also eschews realistic discussion of the likely response to denying state legislators absolute immunity—indemnification of legislators by the state. *Tenney* thus isolates section 1983 from an important technique for accommodating both the need for compensation of victims and the desire to insulate the immediate wrongdoer from full responsibility. In a broader perspective, *Tenney* reveals the Court's early leaning towards a functional view of section 1983. The case offered an opportunity to merge the functional and historical views of section 1983 in a way that would preserve the essence of both. Instead, *Tenney* made the two views competitors: A functional, broad view of section 1983 was made to correspond with a reduction in its ability to serve its core historical functions.

1. *Analytical Problems in Tenney*

Tenney implicitly rejects interpreting section 1983 through the simple expedient of reading it. Whatever else legislators are, they also are "persons," the word section 1983 employs to describe those whose misbehavior it encompasses. Of course, in interpreting section 1983, as in construing any other provision, plain text may provide incomplete guidance.⁵² Because the statute affords no exceptions for special classes of persons and because the state legislators who enacted the Black Codes were among the persons whose misbehavior chiefly distressed the Reconstruction Congresses,⁵³ the Court should have dealt explicitly with section 1983's text. Given the statute's text and the result Justice Frankfurter seemed determined to reach, it is not surprising that he rested his case on other grounds.

Understandably, Justice Frankfurter tried to tie the Court's decision to Congress's will. He argued that Congress, sensitive to the need for legislative freedom, would not have impinged on the historical tradi-

⁵⁰ *Id.* at 376-77.

⁵¹ *Id.* at 376.

⁵² *See, e.g.,* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981). *See generally* note 99 *infra*.

⁵³ *See* *Monroe v. Pape*, 365 U.S. 167, 173-74, 180 (1961) (a purpose of § 1983 is to override certain state laws).

tion of immunity without some express signal.⁵⁴ There being none, he continued, the Court "cannot believe that Congress . . . would impinge on a tradition so well grounded in history. . . ."⁵⁵

This line of analysis is something of a legal shell game. In *Tenney*, the statutory language is plain—the statute literally covers legislators—but the absence of express legislative history is said to mandate a narrow interpretation of the plain language. One could apply this analysis to the entire statute and find no congressional intent to break with the tradition of state autonomy that predated the Civil War and was traceable back to the revolution. Moreover, as Justice Frankfurter must have recognized, the Court could have reversed the burden of persuasion on the immunity issue to generate a different conclusion. Given the plain language and no express contrary guidance in the legislative history, why not conclude, as the Court would in other contexts,⁵⁶ that Congress meant what it said: State legislators are subject to liability.⁵⁷

More importantly, the traditional legislative privileges that form the basis of Justice Frankfurter's argument provide less guidance than he suggested. *Tenney's* straightforward appeal to historical legislative privileges, and the statement that Congress could not have meant to change so basic a rule, obscure a crucial issue. All agree that the Civil War amendments and related legislation revolutionized federal-state relations.⁵⁸ State legislative misbehavior in violation of the Constitution and section 1983 was well within the sphere of activity that became amenable to federal sanctions. Given the revolution in federalism that accompanied the enactment of section 1983, and the category of behavior under consideration, Justice Frankfurter derived definitive guidance from what was in fact a different legal era. The gap between pre- and

⁵⁴ *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

⁵⁵ *Id.*

⁵⁶ See text accompanying note 142 *infra*.

⁵⁷ The Court has used the technique employed in *Tenney* (requiring a clear statement to modify a position obviously favored by the Court) to confer other immunities under § 1983, see text accompanying note 79 *infra*, and in numerous other areas affecting civil rights litigation, see *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (requiring Congress to state its intention to enforce fourteenth amendment guarantees); *Allen v. McCurry*, 449 U.S. 90, 98 (1980) (requiring express disaffirmation of res judicata rules); *Davis v. Passman*, 442 U.S. 228, 241-43 (1979) (requiring clear congressional statement to induce Court not to find *Bivens* action under fifth amendment); *Quern v. Jordan*, 440 U.S. 332, 343-44 (1979) (requiring express statement to abrogate eleventh amendment immunity). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-36, 3-37, 5-8, at 243, 5-17, at 288-89, 5-19, at 299, 5-20, at 304-05, 6-24, at 381 (1978). An important early use of the clear statement rule was the Court's suggestion in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 78 (1873), that a clearer statement than the fourteenth amendment would be required for the Court to assume that the fourteenth amendment's privileges or immunities clause was intended substantially to restrict state prerogatives.

⁵⁸ See, e.g., *Allen v. McCurry*, 449 U.S. 90, 99 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976) (opinion of the Court by Rehnquist, J.); *Mitchum v. Foster*, 407 U.S. 225, 238 (1973).

post-Civil War notions of federalism requires more of a bridge than Justice Frankfurter's sterile recitation of state legislators' privileges *prior* to section 1983's enactment.

Additional factors cloud the logical relevance of Justice Frankfurter's legislative immunity precedents. Even if there had been no nineteenth-century revolution in federalism, the legislative immunities that Justice Frankfurter invoked involve governmental relationships fundamentally different from those at issue in *Tenney*. No English or American immunity provides precise guidance for a case brought against state legislators under section 1983 for violating federal constitutional rights. The English parliamentary privilege, the various state privileges, and the speech or debate clause are safeguards to secure the separation of powers within unitary governmental systems.⁵⁹ The king was the main threat to parliament;⁶⁰ the executive the main threat to Congress.⁶¹ When state legislators impinge on federally protected rights, different interests are at stake; total reliance on privileges developed for unitary governmental systems seems misplaced. It may be a good idea to protect state legislators from private damages suits for constitutional violations, but the historical precedents are less directly on point than Justice Frankfurter suggested. The precedents stem from different threats to legislative independence in different political systems.⁶²

Justice Frankfurter's failure to acknowledge the different contours of immunity in a federal system relates to another important issue neglected in *Tenney*. The historical immunities relied upon did not develop in contexts involving clear assertions of unconstitutional action—they usually arose in cases involving state tort or contract law. Until the twentieth century, individuals enjoyed relatively few affirmative constitutional protections against state officials' behavior. Thus, nineteenth-century immunity cases do not rely on absolute immunity as a defense to the clear offensive assertion of a constitutional claim.⁶³ The essen-

⁵⁹ See Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1122-48 (1973).

⁶⁰ *Id.* at 1129.

⁶¹ *Id.* at 1139.

⁶² On a selective basis the Court acknowledges and even relies upon the federal government's place at the top of the structure of American government to reject immunity claims by state officials and local governments. See *Owen v. City of Independence*, 445 U.S. 622, 647 (1980) (relying on the will of the "supreme" (federal) sovereign to abrogate any vestige of state sovereign immunity that municipalities may have enjoyed); *United States v. Gillock*, 445 U.S. 360, 368-73 (1980) (federal criminal liability of state legislators). The Court's treatment of the liability of state and federal chief executives also reflects this hierarchy. Compare *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982) (granting president absolute immunity from private damages actions) with *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (upholding cause of action for money damages against state governor). This factor disappears when the Court issues a *Tenney*-like opinion that upholds state or local immunity. See, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979).

⁶³ See *Spalding v. Vilas*, 161 U.S. 483 (1896); *Bates v. Clark*, 95 U.S. 204 (1877); *Bradley*

tially federal nature of many actions against state officials, and the realistic possibility of recovery, did not clearly emerge until the twentieth century.⁶⁴

To support the grant of immunity in *Tenney*, Justice Frankfurter might have made a case for borrowing directly from nonconstitutional tort law. Tort law is a traditional mechanism with which to regulate government behavior. Constitutional violations do not result from behavior different in kind from behavior that involves other legal violations. Nor does constitutional misbehavior contain any generic characteristics that facilitate singling it out for treatment through a separate system of liability. Constitutional limitations are united more by history and a label than by such shared characteristics. They comprise a category of misbehavior that happens to run afoul of one of the limitations on official behavior found necessary or convenient to include in the Constitution. Nothing inherent in constitutional misbehavior renders traditional tort policy inapplicable.

Whatever policies support immunity in nonconstitutional contexts, however, there are factors worth considering before extending immunity to cases involving constitutional rights. For example, deprivations of constitutional rights simply might be deemed too important to go unremedied, regardless of the possible effects on public officials. The law frequently distinguishes between constitutional rights and other rights.

v. Fisher, 80 U.S. (13 Wall.) 335 (1871); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868); *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). None of these cases, which are the major federal nineteenth-century precedents granting or denying immunity, involves a plaintiff's offensive use of the Constitution to state a cause of action. The Court, however, has relied on them to support or shape its modern immunity decisions. See *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). In an important exception to this trend, litigants did make offensive use of the Constitution in takings cases. See *Butz v. Economou*, 438 U.S. at 491 n.16; note 64 *infra*. On occasion, the Court seems not to distinguish between offensive and defensive use of constitutional provisions (other than the takings clause). Thus, the *Butz* opinion invokes *Milligan v. Hovey*, 17 F. Cas. 380 (C.C. Ind. 1871) (No. 9,605) in the discussion of immunity of federal officials from constitutionally-based claims. See 438 U.S. at 491 n.15. Yet *Milligan* used the Constitution only to evaluate the merits of a *defense* to a nonconstitutional cause of action.

⁶⁴ *Ex parte Young*, 209 U.S. 123, 152-56 (1908), established the principle in the case of equitable relief against state officers. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 521-25 (1954). With some antecedents, particularly in voting rights and takings cases, *Monroe v. Pape*, 365 U.S. 167 (1961), established the principle in the case of damages actions against state officials. For a helpful discussion of those antecedents, see Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1124-28, 1138-41, 1158-61 (1969). The modern trend toward federalizing causes of action against state officials does not necessarily imply that courts have rejected or should reject nineteenth century common law immunities in actions against state officials. But the federalization of the cause of action does suggest, and even requires, a rethinking of those immunities in light of the now clearly recognized federal constitutional interests at stake. The Court in *Tenney* pretended that no such rethinking was necessary, an approach that, with some exceptions, carried over to judicial and other immunities. For the exceptions, see the cases cited at note 67 *infra*.

Nonconstitutional rights may be modified legislatively without the cumbersome constitutional amendment process. In habeas corpus cases, constitutional claims, unlike other claims, form a basis for upsetting important traditional rules favoring finality in criminal proceedings.⁶⁵ And since *Ex parte Young*,⁶⁶ unconstitutional behavior has stripped state officials of shelter otherwise provided by the doctrine of sovereign immunity.

Despite these differences, Justice Frankfurter wrote as if questions of official immunity are exactly the same for constitutional as for non-constitutional violations. It is within the range of possibility to have immunity rules for constitutional claims that are less preclusive of recoveries than those for nonconstitutional claims. Indeed, this is just the situation in the case of executive officials and municipalities.⁶⁷ The justification need run no deeper than it runs in other areas in which constitutional claims receive favored treatment. Either constitutional claims are more important than other claims, or the system must pretend that this is so. It is the Constitution that every legislator, judge, and executive official takes an oath to support;⁶⁸ to violate constitutional norms is to break the American social contract. However one may resolve this issue, *Tenney's* constitutional overtones differentiate the case from most of the history and precedent relied on by Justice Frankfurter.

Justice Frankfurter's effort to link state officials' immunity to sound public policy also seems strained. He wrote:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.⁶⁹

Unlike other factors relied on in *Tenney*, this argument seems applicable to both constitutional and nonconstitutional claims. But Justice Frankfurter again overlooks important considerations that might support a contrary result. In the case of civil actions by private citizens, legislators, more than other public officials, are able to protect themselves. They may enact statutes authorizing state payment of the cost of their legal defense and reimbursement for the costs of any judgments ren-

⁶⁵ See 28 U.S.C. §§ 2241(c)(3), 2254(c) (1976).

⁶⁶ 209 U.S. 123 (1908).

⁶⁷ See *Owen v. City of Independence*, 445 U.S. 622 (1980) (common law municipal immunities inapplicable in constitutional cases). Compare *Butz v. Economou*, 438 U.S. 478 (1978) with *Barr v. Matteo*, 360 U.S. 564 (1959).

⁶⁸ U.S. CONST. art. VI, cl. 3.

⁶⁹ 341 U.S. at 377.

dered against them. If corporate directors may be protected from the many forms of lawsuit they face, it seems likely that state legislators, with the power to enact laws and raise funds, would find ways to cushion any liability imposed upon them.⁷⁰

This raises the question whether such a system of liability and indemnification is superior to the *Tenney* doctrine of absolute legislative immunity. At first blush, it saves the best features of absolute immunity and overcomes its principal weakness. Under a reimbursement system, legislators need fear neither liability nor the costs of defending lawsuits, and victims receive compensation. As long as the immunity of states from liability survives,⁷¹ the liability of state legislators is one vehicle with which to shift and spread the financial burden of an unconstitutional law. The cost is spread among the citizenry that elected the wrongdoing officials.⁷²

⁷⁰ See also *Monell v. Department of Social Servs.*, 436 U.S. 658, 713 n.9 (1978) (Powell, J., concurring) (mentioning reimbursement to defendants in § 1983 actions). There may be intangible political limits to legislators' ability to protect themselves from the burdens of civil litigation. Some legislators may take actions that are so unpopular that a reimbursement scheme would prove politically impossible to enact. This limitation may, however, be more theoretical than actual. Reimbursement provisions need not be enacted on a case-by-case basis; a provision that applies to all situations is unlikely to be sufficiently controversial to become a political liability for those voting in favor of it. Even if case-by-case protection were the norm, one could at least be sure that, despite popular opposition, legislators would be sensitive to the need to protect their colleagues from civil actions.

A recent episode illustrates one legislature's willingness to insulate a member from liability despite disagreement with the substance of the member's views. California State Senator John G. Schmitz issued a press release that called abortion-rights advocates "bulldozers," "queers," "murderous marauders" and people with "hard, Jewish and (arguably) female faces," and that called Gloria Allred a "slick butch lawyeress." *Nat'l L.J.*, Mar. 15, 1982, at 7. Ms. Allred commenced a libel action and the Senate Rules Committee agreed to pay an attorney \$125 an hour to defend Senator Schmitz. The Rules Committee justified its action on the ground that the state might be liable for Senator Schmitz's behavior. Ms. Allred, not wishing to impose any liability on the state, expressed her willingness to waive any claim against the state. *Id.*

If one only takes account of the likelihood of reimbursement, the existing individual immunity hierarchy seems upside down: The low-ranking executive official is least able to assure his own reimbursement, but remains liable; legislators, on the other hand, are most able to secure reimbursement but are absolutely immune.

⁷¹ See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Holladay v. Montana*, 506 F. Supp. 1317 (D. Mont. 1981). *But cf.* *Irwin v. Calhoun*, 522 F. Supp. 576 (D. Mass. 1981) (certifying question of immunity in federal court to state supreme court); *Marrapese v. Rhode Island*, 500 F. Supp. 1207 (D.R.I. 1980) (state waived immunity). See generally note 72 *infra*. The issue in *Irwin* and *Marrapese*, whether a state has waived its eleventh amendment immunity in federal court, should be distinguished from the question whether a waiver of immunity in a state's own courts is binding in federal court. The Supreme Court has answered the latter question in the negative. *Edelman v. Jordan*, 415 U.S. at 651, 677 n.19 (1974); *Chandler v. Dix*, 194 U.S. 590, 591-92 (1904).

⁷² If one accepts reimbursement as a likely outgrowth of eliminating absolute legislative (or other) immunity, the immunity issue becomes closely akin to the question whether the state itself should be liable for damages caused by enactment of unconstitutional legislation. If every successful suit against a legislator generates a state-funded reimbursement to the legislator, such suits begin to resemble suits against the state. See *Edelman v. Jordan*, 415

One serious objection voiced against reimbursement systems (although not necessarily against systems for reimbursing legislators) is that they may exclude certain classes of behavior, such as malicious conduct.⁷³ This may be a powerful objection to the relaxation of some immunities, but it carries its least force in the context of legislative immunity. If legislators sense a danger to their pocketbooks or independence, it seems likely that they will find a way to protect themselves. Furthermore, it is unclear whether gaps in current official indemnification systems militate against expanding individual liability under section 1983. These gaps may only demonstrate that successful suits against officials are not a substantial problem. The gaps' existence does not reveal whether they would continue under a regime of more widespread official liability. Therefore, the incompleteness of existing indemnity systems does not justify limiting individual liability under section 1983. If recovery for violations of constitutional rights were the rule rather than the exception, state legislators might feel the need to establish more complete systems of indemnity.

Thus, as a matter of doctrinal analysis, *Tenney* is less than satisfactory. One also may ask whether *Tenney* offers a coherent general conception of section 1983. From the perspective of the "historical" vision of section 1983, *Tenney* abounds in irony. The opinion drapes itself in his-

U.S. 651, 665 (1974); *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 380 F. Supp. 1153, 1159 (E.D.N.C. 1974) (three-judge court), *aff'd*, 519 F.2d 1315 (4th Cir. 1975). Such suits, at least in federal courts, encounter the eleventh amendment immunity of states from suit. Is a reimbursement system sufficiently like recovery from the state to bring into play the eleventh amendment immunity? The obvious answer is no. Any reimbursement system operates at the initiative of and subject to the will of the state. Reimbursement systems do not impinge upon the state's sovereignty to the extent that traditional damages actions against states do. See *L. TRIBE*, *supra* note 57, § 3-35, at 132-33 n.22. One must pause before relying on this answer, however, because the Court's eleventh amendment jurisprudence is so bizarre that few confident predictions may be made. *Cf. Hans v. Louisiana*, 134 U.S. 1, 10-15 (1890) (eleventh amendment interpreted in a way that bears no relation to its language); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (distinguishing between counties and states for eleventh amendment purposes). Compare *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974) (eleventh amendment prevents suits for retroactive damages) with *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977) (eleventh amendment permits suits requiring states to pay cost of future compliance with Constitution).

One commentator has argued that the Court's eleventh amendment doctrine does not prohibit federal damages actions against states in their own courts. See Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981). But see *State v. Green*, 633 P.2d 1381 (Alaska 1981) (states are not "persons" and therefore are not amenable to suit in state court under § 1983).

⁷³ See Bermann, *supra* note 4, at 1190-91 nn.95-98; Cass, *supra* note 2, at 1172-73; Schuck, *supra* note 2, at 330-38; Discussion, 42 LAW & CONTEMP. PROBS. 80, 110 (Winter 1978) (comments of Prof. Dellinger). But see Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 811 (1979) (police officers indemnified even though payors retain the right not to reimburse for egregious misconduct). It also has been argued that psychological costs attend naming individuals as defendants in lawsuits. See Discussion, *supra*, at 107-08 (comments of Prof. Davis). But see *id.* (comments of Prof. Shavell).

tory, but uses the history of immunity out of context, and fails to shape section 1983 according to a conception based on its history.

Tenney implicitly accepts a broad, functional scope for section 1983. The constitutional rights at issue in *Tenney* (basically a first amendment claim combined with claims of crass political motive) bore little resemblance to the rights of racial equality that were the core concern of the 1871 Act. Yet the Court nowhere questioned the use of section 1983 to vindicate first amendment rights. In addition, *Tenney's* absolute barrier to recovery violated the second principle derivable from the historical conception of section 1983: By its terms, *Tenney's* ban applies even in race cases of the kind that formed the historical backdrop for section 1983. Even if one believes that legislative immunity should survive in those core cases, such a holding requires a good deal more explanation than was offered in the *Tenney* opinion.

Whether *Tenney* fits nicely into a historical or functional approach to section 1983 is less important than another of its implications. *Tenney* suggests that a broad, functional reading of the rights to which section 1983 applies can be accomplished only at a cost. That cost is a loss of the depth to which section 1983 will penetrate to redress constitutional deprivations—even in cases raising the core historical concerns of racial equality. *Tenney* might have carved out this class of cases for separate treatment. After *Tenney*, even in cases of clear racial discrimination, legislators are absolutely immune. Thus, because the Court in *Tenney* did not reserve room to restrict immunities in race cases, section 1983's historical mission in race cases competes with its modern functional role as the catch-all constitutional remedy.

2. *Tenney's Legacy*

Even acknowledging the weaknesses in Justice Frankfurter's analysis, other issues must be addressed before embracing greater legislative liability in all cases involving constitutional deprivations. Legislators are, after all, legislators. In theory, they come as close to being sovereign as this country will allow. And difficult problems of causation and attribution must be solved to attach liability to individual members of a voting group. But even if legislators are entitled to greater deference than other officials,⁷⁴ much of what one might say about legislative immunity need not carry over with full force to other classes of officials. Yet *Tenney's* maladies infected much of subsequent immunity doctrine; its neglect of context, its insensitivity to the dual system of government in which section 1983 operates, and its generally narrow approach to immunity issues set the tone for future cases. In addition, establishing

⁷⁴ Cf. C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 93 (1960) (suggesting constitutional limits on congressional power to deal with state legislators).

state legislative immunity has had important effects independent of the Court's reasoning.

The first development extended *Tenney's* grant of immunity to judges. Prior to *Tenney*, some courts had concluded that section 1983 meant what it said and that any person, including a judge, might be liable.⁷⁵ Courts concerned about Congress's intent could point to passages in the legislative history that suggested some awareness that the statute might be used against state judges.⁷⁶ And unlike legislators, judges did not have so uniform a tradition of immunity upon which to rely.⁷⁷

Tenney itself, however, supplied all the interpretive weapons necessary to extend its holding. First, *Tenney* showed that section 1983's text can be made irrelevant to an immunity inquiry. Lower courts that relied on the plain language had been naive or incomplete in their analyses.⁷⁸ Second, although the history of judicial immunity differed from that of legislative immunity, the *Tenney* approach proved flexible. Even if judges were not as frequently immune as legislators, they often had been immune. Without any express reference to judges in section 1983 or an express mandate in the legislative history, courts found it easy to extend immunity to judges.⁷⁹ As in *Tenney*, courts ignored the fact that state judicial immunity from federal civil rights actions posed problems different from those raised by judicial immunity within a unitary governmental system. Also following *Tenney*, courts did not consider whether the traditional immunity of judges, developed in nonconstitutional contexts,⁸⁰ should recede in the face of constitutional claims, or whether some form of reimbursement scheme would better accommodate the competing interests. *Tenney* even provided a new argument to

⁷⁵ *Burt v. City of New York*, 156 F.2d 791, 793 (2d Cir. 1946); *Picking v. Pennsylvania R.R.*, 151 F.2d 240, 250-51 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); *see McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949) (by implication).

⁷⁶ *See Note, Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 324-28 (1969).

⁷⁷ *Id.* at 325-27.

⁷⁸ *See Kenney v. Fox*, 232 F.2d 288, 293 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956); *Tate v. Arnold*, 223 F.2d 782, 786 (8th Cir. 1955) ("[G]eneral language . . . in the Civil Rights Act does not evidence a clear Congressional intent to impair . . . judicial immunity.").

⁷⁹ *See, e.g.*, cases cited in note 78 *supra*.

⁸⁰ The Supreme Court endorsed judicial immunity in two modern cases, *Pierson v. Ray*, 386 U.S. 547 (1967) and *Stump v. Sparkman*, 435 U.S. 349 (1978), but it did not offer any historical precedent in which judicial immunity was invoked to defeat a constitutional claim. To support judicial immunity, *Pierson* relied on *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), a case in which John Suratt's attorney challenged his expulsion from the bar. 386 U.S. at 554. Although the claim might have been phrased in constitutional terms (and today undoubtedly would be so framed) neither the attorney's argument nor the Court's opinion treats the case as having constitutional overtones. *Stump* relied on *Bradley* and also referred to *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1869). *See* 435 U.S. at 355 n.5. *Raudall*, which also involved removal of an attorney from the bar, did not discuss federal constitutional issues.

which judges deciding section 1983 cases might be expected to be particularly sensitive: If state legislators are immune, it would be unseemly to grant state judges less protection.⁸¹

The Supreme Court, again invoking *Tenney*, finally formally adopted absolute judicial immunity from section 1983 actions in *Pierson v. Ray*.⁸² In addressing the issue of defenses available to executive officials, *Pierson* owed an additional debt to *Tenney*. *Pierson* held that arresting police officers enjoy no absolute immunity from suit under section 1983. The officers might, however, defend such actions on the ground that they reasonably believed their behavior to be constitutional.⁸³ In *Pierson*, as in *Tenney*, the Court adopted for section 1983 a body of doctrine developed in a context other than one involving state officers violating federal constitutional rights; it adopted the defense to the common law action for false arrest. But false arrest cases had occurred within unitary legal systems and, in most instances, had not involved constitutional violations.⁸⁴

Tenney's holding, as distinct from its method of analysis, also had an important effect in *Pierson*. However much the policies relied on in *Tenney* might support absolute immunity for police and other executive officials, the police officers in *Pierson* had little practical chance of obtaining it. *Tenney* already had immunized legislators. *Monroe v. Pape* had immunized cities,⁸⁵ and few people thought seriously about reaching the state under section 1983.⁸⁶ With *Pierson's* grant of immunity to judges, either executive officials would remain subject to liability or section 1983

⁸¹ See *Francis v. Crafts*, 203 F.2d 809, 811-12 (1st Cir.), *cert. denied*, 346 U.S. 835 (1953).

⁸² 386 U.S. 547 (1967).

⁸³ *Id.* at 555.

⁸⁴ Commentators have long suggested or implied that constitutional doctrine played virtually no role in shaping the common law liability of state and local officials for what today would be characterized as civil rights violations. See, e.g., 2 C. ALEXANDER, *THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS* §§ 514, 548-550 (1949) (no mention of constitutional overtones to actions against officials); 1 W. ANDERSON, *A TREATISE ON THE LAW OF SHERIFFS, CORONERS AND CONSTABLES* § 132 (1941) (other than habeas corpus actions and a civil action for false imprisonment, no effective remedy for illegal arrest exists); 1 F. MECHEM, *A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS* § 770 (1890) (officer liable for illegal arrest but no mention of constitutional overtones to such action); W. MURFREE, *A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS* §§ 931, 1161 (1884) (sheriff at risk for some unlawful arrests but no mention of constitutional sources for such actions).

By partially insulating police officers from § 1983 liability, *Pierson* also became the first case to build upon a related theme of *Monroe v. Pape*, 365 U.S. 167 (1961). *Monroe* called for § 1983 to "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. In *Monroe*, this passage served to justify rejecting a stringent state of mind requirement as a prerequisite to § 1983 liability. *Pierson* borrowed this theme: "Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." 386 U.S. at 556-57.

⁸⁵ 365 U.S. at 191-92.

⁸⁶ *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), which eliminated *Monroe's* bar on suits against cities, triggered a debate over state liability under § 1983. See

would become a farce, providing an all-encompassing cause of action against numerous absolutely immune defendants.⁸⁷ Thus, the police defendants in *Pierson* would not enjoy absolute immunity, if for no other reason than because their case arose after the parade of cases in which everyone else had been granted immunity.

Tenney's establishment of legislative immunity has recently become important in another way. In 1979, the Supreme Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*⁸⁸ suggested that vast new categories of official misbehavior might be shielded from liability under the umbrella of legislative immunity. The Court in *Lake Country Estates* held that appointed members of a bi-state agency enjoyed absolute legislative immunity when acting in a "legislative capacity" because the functions that they performed were sufficiently similar to those performed by legislators. The Court did not reveal what the Tahoe defendants did that made their acts legislative. The Agency's functions were "to adopt and to enforce a regional plan for land use, transportation, conservation, recreation, and public services."⁸⁹ The members of the Agency, however, did not propose, consider and enact general laws. The functions that they performed seemed analogous to those of planning authorities, zoning boards, and administrative agencies at every level of government.

By not articulating the criteria that made the Tahoe planners "legislators," the Court has encouraged many section 1983 defendants to assert that their challenged acts also fit the *Lake Country Estates* standard for legislative behavior. For example, an internal policymaking board may promulgate rules for hiring in a large city police department. Within their general sphere of coverage, the rules resemble traditional legislation. Should all who promulgate such classes of regulations be absolutely immune? If so, defendants in section 1983 actions then will attempt to tie each challenged decision to their own self-generated set of quasi-legislative standards.⁹⁰ If pre-*Lake Country Estates* empirical results are any guide, defendants may not even have to plead quasi-legislative

Hutto v. Finney, 437 U.S. 678, 700-01, 704 (1978) (separate opinions of Justices Brennan and Powell). The debate ended with *Quern v. Jordan*, 440 U.S. 332 (1979).

⁸⁷ The Court employed similar reasoning to reject absolute immunity for federal executive officials. See *Butz v. Economou*, 438 U.S. 478, 505 (1978).

⁸⁸ 440 U.S. 391 (1979).

⁸⁹ *Id.* at 394.

⁹⁰ See *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (city directors absolutely immune from liability for enacting allegedly unconstitutional zoning ordinance). After *Lake Country Estates* and *Butz v. Economou*, 438 U.S. 478 (1978) (granting absolute judicial and prosecutorial immunity to certain administrative officials), one could glean from portions of the Court's opinion in *Wood v. Strickland*, 420 U.S. 308 (1975), powerful arguments for reversing the Court's decision there to deny school board members absolute immunity. See, e.g., *id.* at 319 ("As the facts of this case reveal, school board members function at different times in the nature of *legislators* and *adjudicators* in the school disciplinary process.") (emphasis added).

immunity. A court eager to avoid yet another section 1983 case will pronounce the defendant immune on the slightest chance that *Lake Country Estates* is applicable.⁹¹

It should be added, however, that neither *Lake Country Estates* nor a subsequent Supreme Court legislative immunity decision, *Supreme Court of Virginia v. Consumers Union of the United States*,⁹² mandates broad new categories of legislative immunity. On their facts, both cases are distinguishable from the onslaught of new legislative immunity claims that courts can expect to encounter. Lake Tahoe, the area regulated by the Tahoe Regional Planning Agency, has strong connections to two states, neither of which satisfactorily could regulate growth in the area on its own. Thus, one could view the Tahoe Regional Planning Agency as a "regional" legislature exercising at least some functions traditionally carried on by state and local legislative bodies. Those performing the tasks that legislators from the two states could not perform were entitled to traditional legislative immunity. The need for this novel layer of governmental action could be viewed as the basis for deeming the Agency's acts to be legislative. Under this view, *Lake Country Estates* provides little basis for extending legislative immunity to other officials.

In *Supreme Court of Virginia*, the Court held that the judges of the state's highest court enjoyed legislative immunity from suits alleging the illegality of Virginia's Code of Professional Responsibility.⁹³ But the *Supreme Court of Virginia* opinion was a far cry from an authorization of legislative immunity for every state official who promulgates rules of general applicability. The opinion emphasizes the Virginia court's claim of inherent power to regulate the bar and that court's exercise of the state's "entire legislative power with respect to regulating the Bar."⁹⁴ The members of the Virginia court, the Supreme Court noted, "are the State's legislators for the purpose of issuing the Bar Code."⁹⁵ Thus,

⁹¹ *Tenney's* establishment of legislative immunity also virtually assures that there will be no satisfactory remedy in an important class of constitutional cases. Consider, for example, the case of an unconstitutional statute enforced by a state executive official. Legislators who support unconstitutional measures, particularly when they believe them to be unconstitutional, are more culpable than the officials who enforce them. Yet only executive officials are liable to those adversely affected by unconstitutional statutes and executive officials may have a good faith defense. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967). This defense, when combined with legislative, judicial, and prosecutorial immunity, often leaves those harmed by unconstitutional laws without a damages remedy. *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny often make it difficult to obtain prospective relief against the enforcement of unconstitutional statutes. In this area, then, the post-*Tenney* liability-immunity system is a clumsy accommodation to the absolute protection that *Tenney* grants to the potentially greatest wrongdoers. See text accompanying notes 281-91 *infra*.

⁹² 446 U.S. 719 (1980). *Supreme Court of Virginia* involved an attack on Virginia's Code of Professional Responsibility, which the state supreme court promulgated.

⁹³ *Id.* at 731-34.

⁹⁴ *Id.* at 734.

⁹⁵ *Id.*

other administrators who might seek the protection of legislative immunity lack the inherent claim to broad legislative power asserted by the Virginia court.

With some effort, then, one can analogize the challenged behavior in *Lake Country Estates* and *Supreme Court of Virginia* to more traditional legislative activity. And at least the Supreme Court has not yet adopted the broadest implications of *Lake Country Estates*. The Court's emphasis in *Supreme Court of Virginia* on factors that do not apply to the vast majority of administrative officials, and its surprising absence of reliance on *Lake Country Estates*, may represent implicit rejection of a broad reading of *Lake Country Estates*.⁹⁶

Analysis of *Tenney* and its legacy reveals more than doctrinal tension. It also illustrates the competition, initiated in *Tenney*, between the historical and functional visions of section 1983. In the political context of 1871, it is questionable whether Congress would have endorsed any immunities in section 1983 cases. Approval by that Congress of their extension to a novel area, as in *Lake Country Estates*, is inconceivable. By the time *Lake Country Estates* was decided, however, section 1983 was firmly established as reaching all constitutional deprivations.⁹⁷ The toll that *Tenney* had exacted for this departure from the historical conception of section 1983 had grown enormously. What started in *Tenney* as a grant of immunity in a relatively strong case for immunity has now grown to include grants of immunity in far less compelling situations.

D. *Monroe v. Pape*

1. *The Scope of Section 1983*

By the time *Monroe v. Pape* was decided in 1961, *Tenney* unobtrusively had established a mold that would shape much of section 1983. But *Monroe* added refinements of its own, not the least of which was its express opening of section 1983 to all constitutional claims. In discussing whether section 1983 provides a cause of action for violations of fourteenth amendment rights, Justice Douglas, writing for the Court, stated:

Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of [§ 1983]. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the

⁹⁶ *But cf.* *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-94 (5th Cir.1981) (mayor absolutely immune for legislative acts), *cert. denied*, 102 S. Ct. 1251 (1982).

⁹⁷ See text accompanying note 103 *infra*.

States by reason of the Due Process Clause of the Fourteenth Amendment.⁹⁸

This literalism, in contrast with *Tenney's* failure to adhere to section 1983's language,⁹⁹ clearly endorsed the functional approach to section 1983. The breadth of section 1983's language seems to betray its limited historical origins. But Justice Douglas's literalism oversimplified a difficult issue—there was more to the matter than simply reading the statute.

The *Slaughterhouse Cases*¹⁰⁰ in 1873 mark the beginning of an important line of precedent supporting a narrower view of section 1983. The *Slaughterhouse* Court interpreted the privileges or immunities clause of the fourteenth amendment to protect only the narrow class of rights it deemed to be inherent in federal citizenship. This narrow interpretation

⁹⁸ *Id.* at 171 (citation omitted).

⁹⁹ Neither *Tenney's* downplay of the text of § 1983 nor *Monroe's* blind reliance on it are isolated occurrences. In each case in which the Court confers an absolute or qualified immunity, the Court, as in *Tenney*, must abandon literal application of the statute. *See, e.g.,* *Quern v. Jordan*, 440 U.S. 332 (1979); *Stump v. Sparkman*, 435 U.S. 349 (1978). But there is a forceful countertrend in which the Court relies on § 1983's language. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), relied in part on § 1983's text to reject limiting the coverage of § 1983 to intentional deprivations of constitutional rights. *Owen v. City of Independence*, 445 U.S. 622, 635, 650 (1980), and *Monell v. Department of Social Servs.*, 436 U.S. 658, 689 (1978), relied on the express design and language of § 1983 to impose liability on municipalities. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), relied on § 1983's "plain language" to interpret it to cover federal statutory claims, a reliance soon abandoned in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). *Wood v. Strickland*, 420 U.S. 308, 322 (1975), relied on § 1983's "categorical remedial language" to shape the good faith defense of school board members.

The Court's treatment of the language of § 1983 reached a low point in *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976), where the Court relied in part on the language to resolve an issue that the statute does not address. After noting that § 1983 imposes liability "only for conduct which 'subjects, or causes to be subjected' a complainant to a deprivation of a [constitutional] right," the Court rejected as not fitting the statutory language relief against a police department and police supervisors for unconstitutional behavior by individual officers. *See also* *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-92 (1978) (language asserted to support rejection of *respondeat superior* liability for cities). Yet tort law often deems a causal connection to exist between behavior by subordinates and their superiors or employing entities. A causal connection is there if one wishes to find it (*see* *Johnson v. Duffy*, 588 F.2d 740, 744 (9th Cir. 1978) (failure to act can "cause" harm within the meaning of § 1983)) and, therefore, the statutory language is not necessarily determinative. *Accord, Schnapper, Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 218, 234 (1979). Many lower courts have limited *Rizzo's* barrier to supervisory liability. *See* *Avery v. Burke*, 660 F.2d 111, 114 (4th Cir. 1981); *Withers v. Levine*, 615 F.2d 158, 162-63 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *Dimarzo v. Cahill*, 575 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 439 U.S. 927 (1978); *Watson v. McGee*, 527 F. Supp. 234 (S.D. Ohio 1981); *Wilcher v. Curley*, 519 F. Supp. 1, 7 (D. Md. 1980); *Salinas v. Breier*, 517 F. Supp. 1272, 1276-77 (E.D. Wis. 1981) (citing cases). Neither *Rizzo* nor *Monell* discusses the line of cases finding supervisors liable under § 1983 when they would be liable under state law. *See* *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973); *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971). *But see* *Smith v. Jordan*, 527 F. Supp. 167, 171-72 (S.D. Ohio 1981); *Seiber v. Cooper*, 522 F. Supp. 157 (E.D. Tenn. 1981).

¹⁰⁰ 83 U.S. (16 Wall.) 36 (1873).

prevented the privileges or immunities clause from supplying any protection against the outrages that had precipitated the Civil War amendments and related legislation. Yet because of linguistic similarities between the clause interpreted in *Slaughterhouse* and the text of section 1983,¹⁰¹ some courts held that section 1983 protected only those rights protected by the fourteenth amendment's privileges or immunities clause.¹⁰²

Justice Douglas correctly suggested that section 1983's text supports a broader view of the provision than that embraced by earlier opinions. Section 1983 seems to cover all constitutional rights.¹⁰³ And extending the attitude of the *Slaughterhouse Cases* to section 1983 would preclude section 1983 from providing protection even in the core areas of concern to the 1871 Congress. But the Court never has disavowed the *Slaughterhouse Cases*. And even if that decision were wrong or irrelevant to interpreting the scope of section 1983, the *Monroe* Court at least owed an explanation of why it chose to reject the restrictive section 1983 precedents.

A more serious problem arises because, having relied on section 1983's text to support his view, and having ignored contrary precedent, Justice Douglas undertook no analysis of the section's scope. That section 1983's text supports an interpretation broader than that suggested by the *Slaughterhouse* line of cases does not necessarily mean that the section must be read, as Justice Douglas read it, to encompass every constitutional claim brought under the fourteenth amendment. In effect, he embraced a functional approach to section 1983 without acknowledging the existence of a competing vision.

It is possible to argue along historical lines for a narrower view of section 1983 that takes account of its broad language. When Congress enacted section 1983, relatively few constitutional rights restricted state activities. The new class of rights underlying enactment of section 1983 was a subcategory within the narrow category of constitutional rights

¹⁰¹ Section 1983 protects "rights, *privileges*, or *immunities* secured by the Constitution." 42 U.S.C. § 1983 (Supp. IV 1980) (emphasis added). The fourteenth amendment prohibits abridgment of "*privileges or immunities* of citizens of the United States." U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁰² See *Brawner v. Irvin*, 169 F. 964, 966 (C.C.N.D. Ga. 1909); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1161 n.141 (1977). In some circles, this restrictive view of the rights protected by civil rights statutes did not die easily. See *United States v. Guest*, 246 F. Supp. 475, 481-85 (M.D. Ga. 1964) (interpreting 18 U.S.C. § 241 (1976) not to cover acts of racially motivated misbehavior because such misbehavior does not infringe federal citizenship rights), *rev'd*, 383 U.S. 745 (1966). See also *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) (§ 1983 protects only "civil rights" and does not encompass constitutional attack on state tax practices).

¹⁰³ Cf. *Fair Assessment In Real Estate Ass'n v. McNary*, 102 S. Ct. 177 (1981) (§ 1983 does not encompass damages actions to redress unconstitutional administration of state tax system where state provides effective remedy). But see *Spears v. Mount Etna Morris*, 313 F. Supp. 52 (W.D. Mo. 1969), *aff'd sub nom. Spears v. Robinson*, 431 F.2d 1089 (8th Cir. 1970)

that bound the states. These new rights, embodied in the Reconstruction program, afforded Blacks increased protection. Because of the narrow scope of other constitutional rights, Congress did not have to pay great attention to the way in which it described the rights that would give rise to a cause of action. In particular, Congress could, without drastic consequence, employ the catch-all "rights, privileges, or immunities secured by the Constitution" to describe the rights protected. The massive expansion of constitutional rights in the second half of the twentieth century raises the question whether the century-old statute should create a federal cause of action for every constitutional violation.

This argument should be assessed in conjunction with the second issue addressed by the Court in *Monroe*—the meaning of "under color of law" in section 1983. May action not authorized by state law be considered action under color of state law within the meaning of section 1983? On this issue, Justice Douglas attempted to provide greater analytical support for his expansive view of section 1983. In a lengthy review of the purposes of the section, he claimed to find support for the view that "under color of law" includes action not authorized by state law.¹⁰⁴ As has been noted, however, none of his evidence provides such support.¹⁰⁵

¹⁰⁴ 364 U.S. 167, 172-87 (1961). This expansive view of the color of law requirement suffered a slight contraction when the Court held that state-funded public defenders do not act under color of state law. See *Polk County v. Dodson*, 102 S. Ct. 445 (1981).

¹⁰⁵ See, e.g., Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1489-92 (1969). As a matter of opinion-writing, it is not clear that all that much support was necessary. *Screws v. United States*, 325 U.S. 91, 107 (1945), and to a lesser extent, *United States v. Classic*, 313 U.S. 299, 323 & n.6 (1941), already had interpreted a "color of law" requirement in an analogous civil rights statute not to require behavior authorized by state law. These decisions made it difficult for the *Monroe* Court to construe § 1983's color of law requirement differently. Justice Frankfurter, however, was not deterred and, in *Monroe*, he attempted in dissent to refight the battle lost in *Screws*. See 365 U.S. at 202-59 (Frankfurter, J., dissenting).

The timing of *Screws* and *Monroe* may have played a more significant role in § 1983's growth than generally is recognized. Expansive interpretation of § 1983 depended upon expansive readings of both the rights protected by § 1983 and the "under color of law" requirement. Because *Screws* already had resolved one of these issues, *Monroe* did not have to render expansive interpretations on both matters. More importantly, *Screws* interpreted generously the color of law requirement in a context in which much less was at stake than was the case with the interpretation in *Monroe*.

Two factors enabled the *Screws* Court to interpret expansively the color of law requirement in a criminal civil rights statute without fear of major repercussions. First, in criminal cases the power of initiation rests solely with the prosecutor, not with the aggrieved parties. In criminal civil rights cases, this power of initiation is used sparingly. See R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 125-33 & n.17 (1947). Second, at the time of *Screws*, the Court had not yet begun its rapid expansion of constitutional rights.

By 1961, however, the constitutional explosion was under way. In the civil context of a § 1983 case, expansive views of the under color of law requirement are not tempered by the power of initiation present in criminal cases. Thus, before *Monroe* was decided, one of the crucial bases for § 1983's expansion had been established. Had the color of law issue initially arisen simultaneously with or after the growth of constitutional cases, the Court might not have interpreted § 1983 so broadly. But cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (generous view of § 1983's scope despite growth of federal laws).

Once one discards Justice Douglas's evidence, there is a lack of direct guidance concerning the color of law issue. The reason is not difficult to discern. The proponents of section 1 of the Civil Rights Act of 1871,¹⁰⁶ from which section 1983 derives, probably were not primarily concerned with what state officers did in violation of state law. Instead, it was official misbehavior expressly or impliedly blessed by state law that was most troubling. In an era when Black Codes and related legislation threatened to maintain a system approximating slavery, it would have been something of a luxury to worry about constitutional deprivations that state officials thought of on their own. In addition, those state officials who did commit egregious violations of state law could be criminally punished under section 2 of the 1871 Act,¹⁰⁷ which reached both public and private conspiracies to violate constitutional rights. Section 1983 need not reach their misbehavior to accomplish Congress's goals. Thus, Justice Douglas relied on section 1983's history to resolve an issue that had not concerned Congress.

In fact, section 1983's text, which had been determinative of the first issue in *Monroe*, probably undermines Justice Douglas's view. As he interpreted the color of law qualification, it is a curious limitation in that it is nearly redundant with the state action requirement. In recent years, the color of law qualification has become largely irrelevant because constitutional violations usually require state action which, in

¹⁰⁶ Ch. 22, § 1, 17 Stat. 13.

¹⁰⁷ See *Monell v. Department of Social Servs.*, 436 U.S. 658, 665 (1978) (§§ 2-4 of 1871 Act dealt with Klan violence). Section 2 stated in part:

[I]f two or more persons within any State or Territory of the United States . . . shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws . . . each and every person so offending shall be deemed guilty of a high crime

Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13-14. Another portion of § 2 provided for the recovery of damages from the offending parties.

Section 2's ability to reach *private* misbehavior has been the subject of confusion. Compare *United States v. Harris*, 106 U.S. 629 (1883) (§ 2's criminal component cannot reach private conspiracies) with *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (§ 2's civil component applied to private conspiracy). This confusion can in part be attributed to the same tensions inherent in § 1983. In *Breckenridge*, for example, the Court struggled both to make sense of the broad language of § 2 (which seems to contemplate application to much private behavior) and to keep § 2 within some historical limits by construing it to reach only conspiracies motivated by race or another class-based animus. *Id.* at 102.

turn, satisfies the color of law requirement.¹⁰⁸ In other words, the color of law requirement adds nothing to section 1983's underlying requirement that the plaintiff be deprived of a right, privilege, or immunity secured by the Constitution.

The color of law requirement may, however, have reflected Congress's concern about action authorized by state law. If so, this would shed further light on the first issue in *Monroe*—the scope of the rights protected by section 1983. The portion of section 1983 that describes the rights protected—the “rights, privileges, or immunities secured by the Constitution”—is qualified by the color of law requirement. This qualification might have been designed to tie section 1983 to the racially discriminatory rules that most concerned Congress. Then, as now, it was relatively rare for state law frontally to violate constitutional precepts. Outside the area of race relations, unconstitutional state laws were not a serious enough problem to have prompted enactment of federal legislation. If “color of law” meant “authorized by law,” section 1983 would be limited largely to racial distinctions drawn by state law and state efforts to enforce those distinctions.¹⁰⁹ This interpretation also gives the color of law requirement meaning independent of the state

¹⁰⁸ See *Rendell-Baker v. Kohn*, 102 S. Ct. 2764 (1982); *Lugar v. Edmondson Oil Co.*, 102 S. Ct. 2744, 2749 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). There are a few situations in which the differences between action under color of law and state action are worth discussing. Private action authorized by state statutes, for example, may be action under color of law but it is not state action. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). But this merely suggests that the important element in § 1983 cases is the state action requirement, not the color of law requirement. Cases satisfying the state action requirement automatically satisfy the color of law requirement. But cf. *Polk County v. Dodson*, 102 S. Ct. 445, 451 n.12 (1981) (state public defender did not act under color of law; no consideration given to whether state action was present); *Ellis v. Blum*, 643 F.2d 68, 83 & n.17 (2d Cir. 1981) (action by state officials acting as federal agents is not action under color of state law). The color of law requirement does have independent significance in cases in which the allegedly violated constitutional rights are secured against private infringement. For example, the color of law requirement prevents § 1983 from providing a cause of action where a private person enslaves another. The thirteenth amendment, which prohibits private acts of slavery, does not require state action. *E.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968). Therefore, a private person may deprive another of thirteenth amendment rights; because private enslavement is not action under color of law, however, § 1983 is inapplicable.

Although the discussion in the text suggests that the enormous overlap between state action and color of law concepts undermines Justice Douglas's interpretation of § 1983, one ought not to place undue emphasis on the point. Congress' enactment and the Court's invalidation of the Civil Rights Act of 1875, see *Civil Rights Cases*, 109 U.S. 3 (1883), and of other nineteenth century civil rights laws suggest that the Reconstruction Congresses did not anticipate the broad outlines of the state action doctrine. If subsequent views of the limitations imposed by the state action requirement differ from the views of the Reconstruction Congresses, one should not make too much of the relationship between the subsequent views of state action and other concepts, such as color of law, in assessing the will of the Reconstruction Congresses.

¹⁰⁹ According to this theory, “under color of law” would have the same meaning in the 1871 Act as Congress probably meant it to have in the Civil Rights Act of 1866. See *Monroe v. Pape*, 365 U.S. 167, 225-34 (1961) (opinion of Frankfurter, J.).

action requirement. Moreover, it explains the breadth of the "rights protected" clause on grounds other than Congress' desire to provide a cause of action for every constitutional violation. The clause listing the rights protected could be phrased broadly because the color of law requirement limited section 1983 to the relatively few instances in which positive state law posed an affirmative threat to federal law.

Thus, a more candid *Monroe* opinion would have acknowledged the ambiguity inherent in the color of law concept. Justice Douglas still might have reached the same result on the color of law issue, but with greater fidelity to the original structure and purpose of section 1983. He might have argued that section 1983's primary purpose was to protect Blacks. In 1871, much progress towards that goal could be made by a provision that only reached activities authorized by state law. In contrast, modern behavior threatening Blacks rarely comes in the form of expressly racial state acts. At least publicly, states today disavow racial discrimination. Therefore, to serve section 1983's overriding purpose of protecting against harm to Blacks, ambiguities in section 1983's color of law requirement should be resolved in favor of including behavior not authorized by state law.¹¹⁰

This modified historical vision of section 1983 might support Justice Douglas's interpretation of the color of law requirement, but it does not support his claim that section 1983 protects so many constitutional rights. That conclusion ought to be reached only after a frank assessment of what really is at issue. Is it sound to provide a cause of action for deprivation of every constitutional right? If so, is section 1983 the appropriate vehicle? Mystical incantations about the history of section 1983 are unlikely to advance these inquiries.

The Court is still struggling to deal with the failure of *Monroe* to address the question of the scope of section 1983. For example, in *Maine v. Thiboutot*, the Court appeared to hold that section 1983 provides a cause of action for violations of federal statutes by state officials.¹¹¹ This might have opened the door to private actions against state officials under the many federal laws that impose responsibilities upon state officials. But *Thiboutot*'s generous approach to section 1983 was one of the Court's more short-lived experiments. In subsequent cases, the Court has qualified the approach to exclude federal statutes in which the Court detects a congressional desire to provide the exclusive means of

¹¹⁰ Cf. *Crocker v. Boeing Co.*, 662 F.2d 975, 1007 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting in part) (ambiguity in § 1981 should be resolved in favor of furthering larger social purposes of the Civil Rights Act of 1866); Levinson, Book Review, 26 STAN. L. REV. 461, 482-83 (1974) (general purpose of Civil Rights Act of 1866 may justify modern interpretation favorable to minorities despite more limited specific intentions of its enactors).

¹¹¹ 448 U.S. 1 (1980).

relief within the statutes.¹¹²

Although *Monroe* did not dictate the *Thiboutot* result, it established the foundation upon which *Thiboutot* rests. Had *Monroe* limited the class of constitutional claims that may be brought under section 1983, the Court at least would have been forced to articulate a rationale for distinguishing between those constitutional claims it allowed and those it disallowed. That rationale would have provided guidance in ascertaining the extent to which section 1983 should encompass violations of federal statutes. And had the *Monroe* Court limited the class of constitutional claims that could be brought under section 1983, it would have been awkward to hold, as *Thiboutot* did, that the section encompassed *all* statutory claims. It is unlikely that Congress meant section 1983 to discriminate among federal constitutional claims but not to distinguish among statutory claims.

There is a less obvious but more important connection between *Tenney* and *Thiboutot*. As argued earlier,¹¹³ *Tenney* isolated the construction of section 1983 from the historical context in which section 1983 evolved. In doing so, *Tenney* protected legislators from liability and limited the effect of section 1983. *Thiboutot* shows that such isolated constructions can lead to expansions of section 1983 that are as questionable as some cases contracting the scope of the provision. Regardless of one's view of section 1983's scope in constitutional cases, it is unlikely that Congress intended section 1983 to be used outside the fields, however loosely defined, of constitutional and civil rights. Given the historical context in which section 1983 arose, it is absurd to suggest that Congress meant section 1983 to become an issue in every case asserting a violation of federal statutory rights by state officials. *Thiboutot* illustrates the functional approach out of control.

Those favorably disposed towards a generous construction of section 1983 should not necessarily rejoice at the Court's holding in *Thiboutot*, nor should they bemoan the inevitable subsequent limiting decisions. When *Tenney* and *Monroe* endorsed a functional approach to section 1983, they sacrificed its ability to provide full relief in some cases that would be remedied under a historical approach. *Thiboutot* threatens to have a similar effect on the expansive *Tenney-Monroe* vision of section 1983. By viewing section 1983 as covering a broad class of statutory claims, *Thiboutot* again threatens the section's utility as a remedy for constitutional violations closer to its core historical concerns.

Many of the cases that an unmodified *Thiboutot* view would have allowed to be litigated under section 1983 would not provide compelling fact situations for imposing liability on state officials. Perhaps the Jus-

¹¹² *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

¹¹³ See text accompanying notes 58-68 *supra*.

tices were moved by the outrageous behavior in *Monroe*; it is unlikely that they would be similarly moved in a case litigated under a federal statute such as the Wild Free-Roaming Horses and Burros Act.¹¹⁴ In protecting state defendants in section 1983 cases brought under such statutes, the Court would generate holdings broadly applicable to section 1983. The doctrines limiting section 1983 established in bizarre statutory cases thus might come to limit the constitutional claims that, under either the historical or functional views, are more central to section 1983.¹¹⁵

2. *The Role of Alternative Remedies*

Monroe also initiated the court's treatment of the effect of alternative remedies in section 1983 cases. Once again, incomplete discussion of the issue laid the groundwork for later conflict and confusion. Justice Douglas deemed the availability of state remedies not to preclude an action under section 1983: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."¹¹⁶ Under this view, the Court need not inquire into the adequacy or scope of the state remedy; that remedy is irrelevant to the availability of a section 1983 action.

From both textual and historical perspectives, Justice Douglas's view of the role of alternative remedies was correct. The nature of Congress' concerns in enacting section 1983 seems to preclude serious consideration of substantial deference to state proceedings. In 1871 those proceedings were the problem, not the solution. But *Tenney* and *Monroe* already had put a great deal of distance between this historical view of section 1983 and the Court's interpretation of section 1983. If section 1983 is given a scope well beyond the problems of 1871, it is questionable whether each constitutional right within the statute's expanded scope should receive the same treatment as the core rights of racial equality.

Furthermore, although section 1983's text supported Justice Douglas's view, *Tenney* had shown that the text need not be determinative. *Tenney* had even provided an interpretive technique that might have

¹¹⁴ 16 U.S.C. §§ 1131-1340 (1976 & Supp. IV 1980) (cited in Appendix to Justice Powell's dissenting opinion in *Thiboutot*, 448 U.S. at 34-35).

¹¹⁵ *Monroe*'s broad interpretation of § 1983 may already have taken a toll in the form of narrow construction of the due process clause and other constitutional provisions. See *Parratt v. Taylor*, 451 U.S. 527 (1981) (fourteenth amendment); *Baker v. McCollan*, 443 U.S. 137 (1979) (fourteenth amendment); *Ingraham v. Wright*, 430 U.S. 651 (1977) (eighth amendment); *Estelle v. Gamble*, 429 U.S. 97 (1976) (eighth amendment); *Paul v. Davis*, 424 U.S. 693 (1976) (fourteenth amendment); Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 202 (1977).

¹¹⁶ 365 U.S. 167, 183 (1961).

supported the opposite result on the issue of exhaustion of remedies. Because state tort actions had been the traditional remedy for police misconduct, a court borrowing from *Tenney's* treatment of the legislative immunity issue could have required an affirmative expression of congressional will to change this pattern, at least in cases not involving the forms of racial discrimination that were the main concern of Reconstruction era legislation. State remedies could have been deemed irrelevant only to those constitutional violations that had concerned section 1983's enactors.

A position even more deferential to state remedies might be adopted by interpreting section 1983 in the context of the emergency that gave rise to it. Congress, the Court has said, enacted the provision to combat discriminatory state laws and their discriminatory enforcement or nonenforcement.¹¹⁷ By 1961, the problem of racial discrimination had taken on very different contours. Most states took the public position that they stood ready to protect minority rights against Reconstruction era abuses. In light of the apparent change in attitude, the Court might have demanded that each plaintiff prove the inadequacy of state remedies.

In any event, a more complete *Monroe* opinion would have discussed why state remedies were irrelevant in section 1983 cases. There are several reasons why Congress might want state remedies to be irrelevant, and those reasons have different implications for future cases. Some reasons would require ignoring state remedies in all cases. If Congress was expressing its faith in the life-tenured, independent character of the federal judiciary, all claims asserting the violation of constitutional rights could be seen as too sensitive to leave to judges without such constitutional protection from political pressure. Alternatively, Congress might have wanted to foster uniform decisions in the area of constitutional remedy. Other congressional objectives might require an inquiry into the efficacy of state remedies, with access to federal court granted only when state remedies are found deficient. For example, Congress might have been concerned with state restrictions on liability, such as immunities to common law tort claims.¹¹⁸ Or if the Congress of 1871 was mistrustful of state courts chiefly in race-relations cases, courts might allow consideration of the availability of state remedies for some constitutional claims but not for others.

In part because *Monroe's* discussion of the role of alternative remedies was incomplete,¹¹⁹ other courts, less sympathetic to a generous con-

¹¹⁷ *Id.* at 173-85.

¹¹⁸ *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394-95 (1971) (relying in part on differences between state tort law and direct actions under the Constitution to justify implying direct actions under the Constitution).

¹¹⁹ Questions about the role of alternative remedies long have plagued the Court's analy-

struction of section 1983, have been able to use the availability of state remedies as a justification for limiting its reach. Although the Court has formally adhered to *Monroe* by not requiring exhaustion of state judicial remedies in section 1983 cases, on other issues the Court has relied on state remedies to curtail section 1983's scope. The Court in *Pierson v. Ray*¹²⁰ casually mentioned that corrections of errors on appeal was part of the basis for granting absolute judicial immunity. In *Imbler v. Pachtman*,¹²¹ the Court pointed to criminal sanctions and bar association disciplinary procedures as alternative remedies to support the grant of absolute immunity to prosecutors. *O'Shea v. Littleton*¹²² relied in part on the availability of other remedies to deny systemic injunctive relief against a city's criminal justice system. And in *Ingraham v. Wright*¹²³ and *Parratt v. Taylor*,¹²⁴ the Court relied on the availability of state remedies to restrict the scope of section 1983, by restricting the content of the Constitution.¹²⁵

sis of civil rights matters lying outside the boundaries of § 1983. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court relied on the theoretical availability of state remedies as a basis for stating that civil rights "cannot be impaired by the wrongful acts of individuals, unsupported by State authority. . . . [An individual's] rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." *Id.* at 17. Thus, the state action doctrine can be viewed in part as an offshoot of the Court's assumption (although unrealistic in the context of the *Civil Rights Cases*) about available alternative remedies.

In actions against federal officials, the Court at least recently has had much less faith in the efficacy of state remedies. Here the Court seems unwilling to assume the effectiveness of state remedies even when they may be fully available. For example, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Court implied a damages action for violations of the fourth amendment. One approach to the question whether the Court should imply such a remedy would be to allow such actions only when state law provides no effective remedy. Justice Brennan's opinion in *Bivens* demonstrates that state tort law will not *always* provide suitable remedies for fourth amendment violations, but it makes no effort to show that state law would not provide an effective remedy on the facts of *Bivens*. For other instances in which alternative remedies figure in the Court's civil rights decisionmaking, see *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2705-06 (1982); *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (relevance of Federal Tort Claims Act remedy to the availability of a *Bivens* action); *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) (relying on various other remedies to justify denial of civil rights removal). See generally T. EISENBERG, *supra* note 39, at 167, 225-26, 303, 335, 340, 369 (1981).

¹²⁰ 386 U.S. 547, 554 (1967).

¹²¹ 424 U.S. 409, 429 (1976).

¹²² 414 U.S. 488, 502-03 (1974). In *O'Shea*, the plaintiffs' request for injunctive relief required analysis of alternative remedies. Traditional equitable principles require consideration of the adequacy of other remedies before granting injunctive relief. For incisive discussion of this requirement's application to civil rights cases, see O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Fiss, Dombrowski, 86 YALE L.J. 1103, 1153-54 (1977).

¹²³ 430 U.S. 651, 676-78, 683 (1977).

¹²⁴ 451 U.S. 527, 541-44 (1981).

¹²⁵ In *Ingraham*, the Court relied on "the safeguards that are available under applicable Florida law" to find that corporal punishment was not a deprivation of liberty without due process of law. 430 U.S. at 676. In *Parratt*, the Court relied in part on Nebraska's having provided the plaintiff "with the means by which he can receive redress for the deprivation" to conclude that negligent loss of a prisoner's property did not constitute a deprivation of property without due process of law. 451 U.S. at 543.

The Supreme Court, from *Monroe* to *Parratt*, has never weighed carefully the relative scope and effectiveness of the alternative state remedies. *Monroe* simply deemed those remedies irrelevant. The ability to correct errors on appeal, relied on in *Pierson* to help justify judicial immunity, does little for the litigant seeking damages for what may have been malicious judicial deprivations of constitutional rights. Moreover, criminal and professional sanctions against prosecutors are rare events; they cannot be controlled by civil plaintiffs, and they provide no relief to aggrieved victims. If *Monroe* failed to consider seriously the role of alternative remedies in the course of expanding section 1983, *Pierson*, *Imbler*, and other cases turn the game around. In contracting section 1983, they relied blindly on alternative remedies, offering equally incomplete justifications.

E. Entity Immunity

As is the case in other areas of immunity, the Court's discussions of entity immunity too often reflect the weak features of *Tenney* and *Monroe*. Essentially, they combine *Monroe*'s abuse of legislative history with *Tenney*'s neglect of historical context.

The entity immunity story begins in *Monroe*. In reviewing section 1983's legislative history, the Court pointed out that Congress rejected an amendment proposed by Senator Sherman that would have made the property of each citizen in a municipality, and that of the municipality itself, liable for specified misbehavior by anyone within the municipality.¹²⁶ The Court interpreted this rejection as showing that Congress did not intend municipalities to be covered by section 1983.¹²⁷ Since the Sherman amendment did so much more than just make cities liable for their own acts, it is impossible to support *Monroe*'s conclusion on the basis of the defeat of the Sherman amendment.¹²⁸

The Court confessed as much in *Monell v. Department of Social Services*,¹²⁹ but it again reached a faulty conclusion on the basis of Congress's rejection of the Sherman amendment. The *Monell* Court acknowledged that municipalities may be liable under section 1983 for their own acts.¹³⁰ Turning to the question whether municipalities may be liable under section 1983 merely because they employ misbehaving subordinates, the Court concluded:

[T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not in-

¹²⁶ 365 U.S. at 187-90.

¹²⁷ *Id.* at 191-92.

¹²⁸ For example, the Sherman amendment would have imposed liability on a municipality for acts by private persons not connected with the municipality. See *id.* at 187-90.

¹²⁹ 436 U.S. 658 (1978).

¹³⁰ *Id.* at 683-90.

tend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.¹³¹

As in *Monroe*, the *Monell* Court drew an unsupportable conclusion from the rejection of the Sherman amendment. As proposed, the amendment imposed two forms of liability that *respondeat superior* liability does not impose. First, the amendment would have imposed liability for acts by all persons in the municipality, whether public or private.¹³² Except in unusual cases, *respondeat* liability under section 1983 would not make cities liable for private misbehavior. Second, the Sherman amendment would have made both the city and private individuals liable.¹³³ *Respondeat* liability under section 1983, on the other hand, would not impose liability on private individuals for misbehavior by public officials. Therefore, important features of the Sherman amendment, some more extreme than *respondeat* liability, formed more likely bases for its rejection.¹³⁴

Tenney's contribution to the law of municipal immunity, and the freedom that its historical technique provides the Court, emerged in two subsequent entity immunity cases. In *Quern v. Jordan*,¹³⁵ the Court considered whether section 1983 abrogates state immunity from suit in federal court. In light of the wording and background of section 1983, and the Court's repeated acknowledgement of it as a symbol of the post-Civil War revolution in federalism,¹³⁶ one easily could interpret section 1983 as manifesting such a congressional intent. Alternatively, the Court might have followed *Monell* and found the language of section 1983 to dictate state liability. In support, it could have noted that nothing in the legislative history of section 1983 suggests a congressional decision to immunize states from liability,¹³⁷ or it might have noted the absurdity of

¹³¹ *Id.* at 691 (emphasis in original).

¹³² *Id.* at 702-03 (Appendix to Court's opinion).

¹³³ *Id.* Only one draft of the Sherman amendment made private persons liable. *See id.*

¹³⁴ Despite *Monell*, cities remain vulnerable for some employee misbehavior. The guiding rhetoric requires detection of official city policy—a concept of some elasticity. *See, e.g.,* *DeVasto v. Faherty*, 658 F.2d 859, 866 (1st Cir. 1981) (city's "custom, policy and practice in searching plaintiff's home" held constitutional); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) ("municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under section 1983"); *Turpin v. Maillet*, 619 F.2d 196, 201 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1981) (implicit or tacit authorization may be official policy); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) (equating high executive behavior with official policy).

¹³⁵ 440 U.S. 332 (1979).

¹³⁶ *See, e.g.,* *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

¹³⁷ *See generally* *Monell v. Department of Social Servs.*, 436 U.S. 658, 664-89 (1978) (reviewing § 1983's legislative history); *Monroe v. Pape*, 365 U.S. 167, 172-82 (1961) (same).

distinguishing between states and political subdivisions of states for purposes of immunity under section 1983.¹³⁸ The *Quern* Court, however, expressly relying on *Tenney*, concluded that Congress had not intended "by the general language of [section 1983] to overturn the constitutionally guaranteed immunity of the several States."¹³⁹ The Court had learned the lesson of *Tenney*: Place a heavy enough burden on the statute and its history and one always can support the status quo.

The second entity immunity decision—*Owen v. City of Independence*¹⁴⁰—severely strained this technique. The question presented in *Owen* was whether municipalities enjoy the good faith defense available to individual defendants under section 1983. The Court acknowledged that at common law municipalities have enjoyed immunity for at least some governmental functions.¹⁴¹ Given this concession, the *Tenney* technique requires an express statement by Congress abrogating the immunity. Instead, the Court stood *Tenney*'s technique on its head:

[W]e can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," . . . we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.¹⁴²

In *Quern* and *Tenney*, Congress had been required affirmatively to abrogate a pre-existing immunity. Now, the Court said, Congress must affirmatively *grant* immunities.

Taken together, *Quern*, *Monell*, and *Owen* have one other startling feature. Because some states were playing the central role in the suppression of Blacks, state laws were express targets of the Civil Rights Acts of 1866¹⁴³ and 1871.¹⁴⁴ "States' rights" was the rallying cry for

Indeed, one might build a case from the legislative history to the effect that states, but not municipalities, should be liable under § 1983. When provisions for municipal liability were rejected, it was partly on the ground that states, not municipalities, were responsible for law enforcement functions. See 436 U.S. at 668.

¹³⁸ See generally Comment, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042 (suggesting that both states and their political subdivisions should be immune).

¹³⁹ 440 U.S. 332, 342 (1979).

¹⁴⁰ 445 U.S. 622 (1980).

¹⁴¹ *Id.* at 644-50.

¹⁴² *Id.* at 650 (citations omitted).

¹⁴³ 14 Stat. 27. See 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88: PART ONE 1224 (1971).

¹⁴⁴ 17 Stat. 13.

resistance to Reconstruction and the federal civil rights program.¹⁴⁵ Yet in these three opinions the Court finds a congressional will to (1) leave state immunity intact and (2) subject municipalities to new categories of liability without the benefit of a good faith defense.

Quern also eliminated one possible defense of the Court's section 1983 results. Until *Quern*, anomalies in the Court's sovereign immunity doctrine were a leading source of difficulty in section 1983 cases involving governmental entities. A nineteenth century sovereign immunity case, *Hans v. Louisiana*,¹⁴⁶ established the questionable and textually unsupportable rule that the eleventh amendment protects states from suits by their own citizens. *Lincoln County v. Luning*,¹⁴⁷ another nineteenth-century sovereign immunity case, held, with little supporting reasoning, that cities and counties do not enjoy the protection of the eleventh amendment. *Hans* and *Lincoln County* insulated from liability the entity ultimately responsible for governmental failures "under color of" state law and distinguished between the state and governmental entities that exist as creatures of the state. With these holdings in place, there was little chance that a sensible law of entity liability could develop under section 1983.

Quern and circumstances offered the Court that slim chance. By the time *Quern* was decided, the Court had established that Congress has power to modify states' eleventh amendment immunity.¹⁴⁸ All the Court need have found in *Quern* was a congressional desire to do so. Finding such an intent seemed as supportable as not doing so.¹⁴⁹ But the Court's refusal to find the requisite intent added to section 1983 jurisprudence the anomalies of eleventh amendment doctrine.

This unfortunate marriage of section 1983 doctrine to eleventh amendment doctrine yields a new anomaly. Prior to *Quern*, the Court had detected in the Civil Rights Attorneys' Fees Award Act of 1976¹⁵⁰ the congressional mandate required to penetrate the eleventh amendment barrier.¹⁵¹ *Quern* thus assures that when clients have suffered damages from constitutional violations by states, only their attorneys will receive direct economic benefit from an action against the state.¹⁵²

¹⁴⁵ See *Quern v. Jordan*, 440 U.S. 332, 354-65 (1979) (Brennan, J., concurring in judgment).

¹⁴⁶ 134 U.S. 1 (1890).

¹⁴⁷ 133 U.S. 529 (1890).

¹⁴⁸ *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹⁴⁹ See 440 U.S. at 354-65 (Brennan, J., concurring in judgment).

¹⁵⁰ 42 U.S.C. § 1988 (Supp. IV 1980) (second sentence).

¹⁵¹ *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978).

¹⁵² A generous interpretation of the Civil Rights Attorneys' Fees Award Act may lead to tension in other areas. It remains an open question whether judicial immunity precludes injunctive relief against judges. See Supreme Court of Va. v. Consumers Union of the U.S., 446 U.S. 719, 735-36 (1980). At least some lower courts that allow injunctive actions against judges allows attorney's fees to be awarded against them. *Morrison v. Ayooob*, 627 F.2d 669,

F. *Section 1983 and the Civil Rights Movement*

It is possible to highlight the weaknesses in *Tenney* and *Monroe*, identify those weaknesses as sources of confusion in later cases, and retain the luxury of not determining whether stronger opinions in each case would have made any difference. It is one thing to argue that the Court should have considered fully the historical and constitutional context in which section 1983 operates; it is quite another to decide whether the additional considerations would have translated into different results. Had the Court taken into account the additional factors discussed above, it might well have reached the same results. But one can also conceive of circumstances in which public liability law might have taken strikingly different turns.

Enacted in 1871 as part of the legislative program to assist the then recently-freed Blacks, section 1983 barely had time to develop before the *Slaughterhouse Cases*, the invention of the state action limitation, and a generally narrow view of the Constitution's protection of individual rights combined to deprive section 1983 of any significant constitutional rights to which liability might be attached. If section 1983 had developed in the 1870s in the context of cases involving overt legislative, judicial, and prosecutorial hostility to Blacks—the very type of official misbehavior that helped prompt its enactment—there would have been great pressure to limit the availability of absolute immunity. The historical vision of section 1983 might have dominated, for the cases brought to the Court would have provided powerful reminders of the historical circumstances that led to section 1983's enactment.¹⁵³

When section 1983 began its modern doctrinal development, particularly in the Supreme Court's immunity cases, the development remained remarkably free of influence of the most important social force of the time, the civil rights movement—the one force capable of generating cases that would remind the Court of section 1983's origins. That movement reshaped many aspects of public law. *Dombrowski v. Pfister*,¹⁵⁴ however temporarily,¹⁵⁵ opened the doors of federal courts to civil rights workers. *Griffin v. County School Board*¹⁵⁶ seemed to support federal judi-

673 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981); *R.W.T. v. Dalton*, 540 F. Supp. 772, 773 (E.D. Mo. 1982). See also Federal Court Improvement Act of 1982, Pub. L. No. 97-164, § 116, 96 Stat. 25 (allowing Administrative Office of U.S. Courts to pay federal judges' defense costs); 67 A.B.A.J. 1248 (1981) (judges purchasing malpractice insurance).

¹⁵³ Ironically, had § 1983 developed in the 1870s, it is unlikely that it would have survived. Most of the effective civil rights laws were repealed in 1894. See Act of Feb. 8, 1894, ch. 25, 28 Stat. 36. By 1903, civil rights legislation had become so moribund that Justice Holmes felt it necessary to articulate his assumption that § 1983 (Revised Statutes § 1979) had not been repealed. *Giles v. Harris*, 189 U.S. 475, 485 (1903). By playing dead, § 1983 lived to fight another day.

¹⁵⁴ 380 U.S. 479, 491-92 (1965).

¹⁵⁵ See *Younger v. Harris*, 401 U.S. 37, 47-54 (1971) (distinguishing *Dombrowski*).

¹⁵⁶ 377 U.S. 218, 233 (1964).

cial takeover of local taxation if necessary to avoid surrender to school segregationists. Other aspects of public liability law, including part of the sovereign immunity bastion,¹⁵⁷ fell victim to the Court's commitment to school desegregation; the state action doctrine was stretched near the breaking point.¹⁵⁸ Yet of all the Supreme Court's section 1983 immunity cases, only *Pierson v. Ray*¹⁵⁹ was a civil rights movement case. Even there, the police had acted mildly in comparison to official action in other cases involving southern law enforcement. They had merely arrested protesters; they had not hosed or beaten them. Given the doctrinal breakthroughs that the civil rights movement produced in other areas, the right race case at the right time might have started a significant movement towards liability under section 1983. At a minimum, it might have caused the Court to consider a two-tier system of liability under section 1983. Cases raising racial equality issues directly related to the issues that prompted section 1983's enactment would generate narrow immunity rules. Cases involving other constitutional claims would generate results resembling the current immunity structure.

The absence of civil rights movement cases from the Court's section 1983 docket may not have been accidental. Somewhere in its mass of appeals and certiorari petitions there must have resided cases that would have provided an opportunity to impose liability under appealing circumstances. The Court's program of racial equality, however, did not require extraction of damages from wrongdoers. The injunction in its many forms was the sword of the civil rights movement,¹⁶⁰ and its effectiveness was relatively unaffected by the immunity doctrines.

In fact, imposition of liability might have threatened successful completion of the Court's civil rights agenda. In merely approving issuance of injunctions and reviewing criminal convictions, the courts provoked criticism. Many critics did not wait for the large scale institutional cases of the 1970s¹⁶¹ to conclude that courts were going too far in reshaping society.¹⁶² Imposition of damages liability upon public officials or entities might have fueled the flames of resistance and endangered public acceptance of the Court's program of racial equality. It may not be coincidental that it was Governor Rhodes in Ohio in 1973, rather than Governor Maddox in Georgia in the 1960s, who first learned that governors may be liable under section 1983.¹⁶³ However divided the country was over Vietnam and the related Kent State shootings by

¹⁵⁷ *Milliken v. Bradley*, 433 U.S. 267 (1977).

¹⁵⁸ *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁵⁹ 386 U.S. 547 (1967). See note 120 and accompanying text *supra*.

¹⁶⁰ See generally O. FISS, *supra* note 122.

¹⁶¹ See generally Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

¹⁶² See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

¹⁶³ See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

guardsmen under Governor Rhodes's ultimate command, the possible imposition of liability upon him occurred after the sharpest conflicts over Vietnam had subsided. More importantly, imposition of liability upon him in the 1970s would not provide a potentially dangerous rallying point for resistance to the Court's decisions. Imposition of liability upon a Southern governor in the 1960s would have done little to facilitate acceptance of the Court's racial equality decisions.

G. *On Past and Future Weaknesses*

Many sources have contributed to confusion in section 1983 litigation. Some of the difficulties have stemmed from analytical errors represented by *Tenney's* mindless use of history, while others have arisen from misreading or distorted use of section 1983's history (as in *Monroe*) or from the spread of doctrinal stains from related areas (as in the case of sovereign immunity). The difficulties do not exhaust the list, but they are among the more avoidable problems. Other problems, those caused by section 1983's place in a federal system and its now established role as constitutional enforcement mechanism, likely will prove less tractable.

Recent writings by Justices and commentators threaten to introduce a new basis for anomalous section 1983 decisionmaking. This new basis does not purport to be tied to history in general, to section 1983's history in particular, or to detailed analysis of cases or doctrines. Rather, it consists of the assertion that section 1983 cases are overwhelming the federal courts. To some, this assumed fact translates into a need for an exhaustion of remedies requirement in section 1983 cases.¹⁶⁴ Others view it as evidence that section 1983 has grown too large and must be restricted.¹⁶⁵ The central vision is one that many critics share: There are too many section 1983 cases.

This premise seems amenable to empirical verification and should be carefully examined lest the Court add to the questionable set of premises that have governed its section 1983 decisionmaking. Part II, which analyzes empirical data about the operation of section 1983, commences the necessary examination. At least some of the evidence does

¹⁶⁴ See *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2577 (1982) (Powell, J., dissenting); O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 815 (1981). Justice O'Connor also has suggested that an exhaustion of state remedies requirement may reduce the judiciary's budgetary needs. N.Y. Times, Mar. 12, 1982, at A28.

¹⁶⁵ See *Maine v. Thiboutot*, 448 U.S. 1, 23 (1980) (Powell, J., dissenting) (overburdened courts are reason for narrowly construing § 1983); *Butz v. Economou*, 438 U.S. 478, 526 (1978) (Rehnquist, J., dissenting) (relying on the number of civil rights cases to support grant of individual immunity); *Monell v. Department of Social Servs.*, 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting) (torrent of civil rights litigation justifies municipal immunity from § 1983 actions); *Wisconsin v. Constantineau*, 400 U.S. 433, 443 (1971) (Burger, C.J., dissenting) (docket congestion justifies abstention).

not support the assumption that section 1983 overburdens the federal docket.

II

THE REALITY OF SECTION 1983 LITIGATION

One hardly can read about section 1983 without seeing a reference to the overwhelming number of section 1983 cases. More importantly, decisions have been, and may continue to be, influenced by impressions about the number of such cases.¹⁶⁶ Recently enacted and proposed legislation rests in part on the premise that section 1983 cases are inundating the courts.¹⁶⁷ In a concurring opinion in *Parratt v. Taylor*, Justice Powell offered the escalation of section 1983 suits as a reason to interpret the statute as not encompassing merely negligent conduct.¹⁶⁸ Justice (then Judge) O'Connor invoked the federal caseload increase as a reason for Congress to curtail the use of section 1983.¹⁶⁹ Other judges, many of whom are sympathetic to federal protection of civil rights through section 1983, have noted both the number and scope of cases and have supplied enough commentary on the section to suggest widespread judicial concern.¹⁷⁰

Commentators also display concern with the workings of section 1983. Reciting caseload statistics sometimes is implicit commentary that the statute is out of hand.¹⁷¹ Others expressly call for restricting the scope of the statute to particular classes of cases narrower than those

¹⁶⁶ I do not mean to suggest that concern about burdening the federal courts is the only factor influencing debate about the role of § 1983.

¹⁶⁷ Section 5 of the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997e (Supp. IV 1980)) requires state prisoners under certain circumstances to exhaust state administrative remedies before seeking relief under § 1983. Part of the rationale for the Act was Congress's impression that prisoner suits are "swamping our judges." S. REP. NO. 416, 96th Cong., 2d Sess. 34 (1979). Hearings on proposed amendments to § 1983 also reflect concern about the number of § 1983 cases. *Hearings, supra* note 39, at 15 (statement of Sen. Thurmond).

¹⁶⁸ 451 U.S. 527, 546, 553-54 & n.13 (1981); see note 165 *supra*. For other recent expressions of judicial concern about the volume and nature of § 1983 cases, see, e.g., *Lewis v. County of Lehigh*, 516 F. Supp. 1369, 1372 (E.D. Pa. 1981); *Sloan v. Southampton Correctional Center*, 476 F. Supp. 196, 197 (E.D. Va. 1979); Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 822 (1981).

¹⁶⁹ O'Connor, *supra* note 164, at 810.

¹⁷⁰ See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 16-17 (1973); Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, and the Federal Case Load*, 1973 LAW & SOC. ORDER [currently ARIZ. ST. L.J.]557; Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK U.L. REV. 567 (1971); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

¹⁷¹ See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 950 (1973 & Supp. 1981); Cass, *supra* note 2, at 1159.

classes it now encompasses.¹⁷² Even sympathetic critics mention the burdens that section 1983 imposes on the federal courts.¹⁷³

In one respect, the shared concern about section 1983 is understandable. The oft-quoted statistics are, at least at first glance, startling: Between 1961 and 1979, nonprisoner civil rights cases filed in federal district courts increased from 296 to 13,168;¹⁷⁴ state prisoner filings in federal courts showed a similar jump, increasing from 218 in 1966 to 11,195 in 1979.¹⁷⁵ *Maine v. Thiboutot*'s¹⁷⁶ holding that section 1983 encompasses purely statutory claims may be a fertile source of new cases.

Of course, one should hesitate before relying on these numbers to conclude that the volume of section 1983 cases raises an isolated problem. Several possible explanations exist for the growth of section 1983 litigation: increases in population, increases in the number of prisoners, increases in the number of lawyers (or of lawyers willing to bring civil rights cases), increases in the number of police, the expansion of constitutional rights, increased availability of attorneys' fees, and decreased responsiveness of other branches of government.¹⁷⁷ To view the increase in section 1983 cases as a problem demanding a remedy without understanding the cause of the increase may engender a cure that entails more costs than benefits. Indeed, one may conclude that the growth is unavoidable, or even a positive development.

Even if the growth of civil rights litigation generates a prima facie "problem" for the federal courts, raw numbers always tell an incomplete story. To obtain a clearer picture of section 1983 in operation, I conducted a study of section 1983 cases filed in 1975 and 1976 in the Central District of California, which is located in and includes Los Angeles.

¹⁷² See Note, *supra* note 105; Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134 (1980).

¹⁷³ See Nahmod, *The Mounting Attack on Section 1983 and the 14th Amendment*, 67 A.B.A.J. 1586 (1981); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980). See also Schuck, *supra* note 2, at 283 n.2 (discussing limited nature of available data).

¹⁷⁴ ADMINISTRATIVE OFF. U.S. CTS., 1979 ANNUAL REPORT OF THE DIRECTOR 6; ADMINISTRATIVE OFF. U.S. CTS., 1975 ANNUAL REPORT OF THE DIRECTOR 194. These reports are based on July 1 to June 30 fiscal years.

Other compilations suggest similar increases in suits against the police. See Project, *supra* note 73, at 781 n.3. Interestingly, in fiscal year 1980 the number of civil rights filings in U.S. district courts fell to 12,944, a decline of 1.7% from fiscal 1979, but the 1981 figure rose to 15,419, an increase of 19.1% from 1980. ADMINISTRATIVE OFF. U.S. CTS., 1981 ANNUAL REPORT OF THE DIRECTOR 75. The 1978 figure also suggests a decline in the number of such filings from 1977. *Id.* These statistics do not distinguish between civil rights cases brought under § 1983 and civil rights cases brought under other civil rights statutes. See text accompanying notes 231-38 *infra*.

¹⁷⁵ ADMINISTRATIVE OFF. U.S. CTS., 1979 ANNUAL REPORT OF THE DIRECTOR 61; ADMINISTRATIVE OFF. U.S. CTS., 1975 ANNUAL REPORT OF THE DIRECTOR 207.

¹⁷⁶ 448 U.S. 1 (1980).

¹⁷⁷ For an interesting effort to predict caseloads based on a variety of variables, see Goldman, Hooper & Mahaffey, *Caseload Forecasting Models for Federal District Courts*, 5 J. LEGAL STUD. 201 (1976).

If the Los Angeles experience is representative, two major conclusions emerge from the study. First, the sheer volume of section 1983 cases poses no serious threat to the federal court system. Section 1983 cases neither place unbearable burdens on the courts nor direct massive resources to relatively minor claims. Neither the number nor the nature of section 1983 cases justifies major doctrinal change. Second, problems do attend the operation of section 1983. There is evidence that courts strain doctrine to dismiss section 1983 cases and that federal judges are inhospitable to the clumsy pleadings of pro se litigants.¹⁷⁸

A. *Methodology*

Because only a small proportion of section 1983 cases lead to published opinions, studies of this sort require examination of pleadings and court records. In this study, student research assistants attempted to gather detailed information on every section 1983 case filed during 1975 and 1976 in the Central District of California. For each such case, the students compiled a factual summary of the basis for plaintiff's claims, the relief sought, any defenses or immunities asserted by the defendants, the name of the judge, the presence or absence of counsel, and a record of all proceedings in the case. With a few exceptions, all the cases studied terminated prior to the time the data were analyzed. No general effort was made to obtain information beyond that contained in the district court record.

At the outset, it should be noted that any study of this kind has limitations. The study is incomplete, even as a picture of section 1983 litigation in Los Angeles. A more complete study would include analysis of section 1983 cases brought in state court as well.¹⁷⁹ Even in the studied federal cases it is difficult to evaluate fully judicial performance, for no effort was made to go beyond each case's written record. In addition to monitoring certain indicia of the burden that the cases imposed on the courts, the study can assess only those issues that emerge with some clarity in the pleadings. Inartistic pleadings further complicate the task.¹⁸⁰ Finally, the period studied may be more remote than one would

¹⁷⁸ Professor Shapiro's study of habeas corpus in Massachusetts found similar problems. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

¹⁷⁹ Given the continuing debate about the need for access to federal courts (*compare* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) with Bator, *supra* note 47), it would seem valuable to compare the results of this study with a similar study of state court § 1983 cases.

¹⁸⁰ There also are cases that will not show up in a study of § 1983 actions but that perhaps should be included. A plaintiff seeking to enjoin enforcement of an unconstitutional state statute need not rely on § 1983 to state a cause of action. A direct action under the Constitution in such cases can be traced back to *Ex parte Young*, 209 U.S. 123 (1908). We found at least one such case in this study. *See* Orrin W. Fox Co. v. New Motor Vehicle Bd., Civ. No. 76-1200 (C.D. Cal., filed Apr. 13, 1976) (three-judge court) (complaint seeks declaratory and injunctive relief, relies on the fourteenth amendment, but does not invoke § 1983),

hope for in an ideal study. There have been significant changes in section 1983 doctrine since 1975 and 1976, some of which undoubtedly affect the number of filings.¹⁸¹

Still, one should not understate the study's relevance. The findings concerning the nature and burden of section 1983 cases are consistent with the few other empirical studies available.¹⁸² If Los Angeles does not represent the national experience, it does illustrate the experience in the great metropolitan areas, where a large portion of section 1983 litigation occurs.¹⁸³ Perhaps one cannot claim that Los Angeles's mix of White, Black, Hispanic, and Oriental communities is "typical," but few cities lack some such mix.¹⁸⁴ And Los Angeles does not have a police department, such as Philadelphia's, that provokes truly extraordinary

rev'd, 439 U.S. 96 (1978). After enactment of the Civil Rights Attorneys' Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as the second sentence of 42 U.S.C. § 1988 (Supp. IV 1980)), which authorizes fees in cases brought against state officials under § 1983 but does not authorize fees in cases brought directly under the Constitution, a plaintiff should include a § 1983 cause of action in a complaint seeking injunctive relief against allegedly unconstitutional behavior.

Mundane logistical problems also frustrate efforts to effect a complete study. For example, district court records reveal at least eight 1975 cases and ten 1976 cases that may have been § 1983 cases but that were transferred to other jurisdictions. Complete records for these cases were no longer available in Los Angeles. In addition, at least four 1975 and three 1976 cases, which may or may not be § 1983 cases, could not be completely analyzed because their files were incomplete or unavailable. The docket sheets indicate that two of the 1975 cases were dismissed, *Palacio v. Pitchess*, Civ. No. 75-2848 (C.D. Cal., filed Aug. 25, 1975); *Simons v. Kane*, Civ. No. 75-918 (C.D. Cal., filed Mar. 13, 1975), one resulted in summary judgment for the defendants, *Re v. Todd*, Civ. No. 75-1754 (C.D. Cal., filed May 23, 1975), and the other resulted in a \$1,000 judgment against a school official. *Mann v. Los Angeles City Unified School Dist.*, Civ. No. 75-3745 (C.D. Cal., filed Mar. 3, 1977). Of the 1976 cases, the docket sheets indicate that one was dismissed, *Leslie v. Superior Court*, Civ. No. 76-3629 (C.D. Cal., filed Nov. 23, 1976), one was disposed of by a combination of dismissal and summary judgment for defendants, *Interstate Marina Dev. Co. v. California*, Civ. No. 76-3270 (C.D. Cal., filed Oct. 19, 1976), and one was stayed pending outcome of a state court case. *Dayton Realty Co. v. City of Rancho Palos Verdes*, Civ. No. 76-1138 (C.D. Cal., filed Apr. 7, 1976). In each case, the complete file could be located neither in the district court nor in the Federal Records Center in Laguna Niguel.

¹⁸¹ See generally text accompanying note 197 *infra*.

¹⁸² See Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527 (1975); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979); Project, *supra* note 73.

¹⁸³ If measured in terms of number of filings, the Central District could be described as a "moderate" district. In fiscal year 1976, it ranked 19th out of 95 districts in number of prisoner civil rights cases filed. Turner, *supra* note 182, at 658-60. But its ranking slipped to 66th by fiscal year 1978. *Id.* at 659. In fiscal year 1976, the Central District ranked 68th in the total number of civil cases filed, ADMINISTRATIVE OFF. U.S. CTS., MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1976, at 103 [hereinafter cited as MANAGEMENT STATISTICS 1976]; in fiscal year 1977, it ranked 64th, ADMINISTRATIVE OFF. U.S. CTS., MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1977, at 103 [hereinafter cited as MANAGEMENT STATISTICS 1977].

¹⁸⁴ For a comparison of the Central District of California's demographic characteristics with those of five other districts, see Grossman, Kritzer, Bumiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86, 99 (1981).

citizen and government reaction which might be expected to distort the picture presented by civil rights cases.¹⁸⁵ Nor should one be too apologetic about the period studied. Many of the most interesting and time-consuming section 1983 cases take more than a few years to complete. A study that does not cover a period at least four or five years old risks classifying as "pending" too great a proportion of the significant cases. More importantly, 1975 and 1976 are relied on today as being among the years in which the number of section 1983 filings showed increases that should be of concern.¹⁸⁶

The study also encountered problems of categorization. How does one decide which cases count as section 1983 cases? In many instances, this determination may be evident from the complaint; often, however, cases involve multiple claims, of which a section 1983 claim is but one. The study counts as a section 1983 case any case in which a section 1983 claim has been made, even if the plaintiff has erroneously relied on section 1983 (as when suing only private parties). This sort of error did not occur frequently enough to change the thrust of the results.

B. *The Burdens of Section 1983 Litigation*

There is no standard method by which to measure the workload generated by a particular group of cases. One crude measure is whether the case resulted in a trial. By this standard, section 1983 cases are not very burdensome. In nonprisoner cases filed in 1976, only ten of 136 cases progressed to trial;¹⁸⁷ in 1975, only seven of 140 cases did so.¹⁸⁸ The number of trials, however, understates the burden; a case that has received much litigant and judicial attention may be settled on the eve of trial, or the critical issue may be a legal question that obviates the need for a trial. A more sensitive measure of the burden imposed by section 1983 cases should take account of other factors.

Another method of assessing the burden of section 1983 cases is to determine the extent to which courts conduct hearings. In 1976, 37 of 136 cases led to some form of hearing.¹⁸⁹ In 1975, the numbers were 39 of 140.¹⁹⁰ A third method measures simultaneously the burden of section 1983 cases on both courts and defendants. Cases in which defend-

¹⁸⁵ See *Rizzo v. Goode*, 423 U.S. 362 (1976); *United States v. City of Philadelphia*, 482 F. Supp. 1248 (E.D. Pa. 1979), *aff'd*, 644 F.2d 187 (3d Cir. 1980).

¹⁸⁶ See authorities cited at notes 165, 168, 171-73 *supra*.

¹⁸⁷ Appendix, Table II. For the classification convention adopted in cases involving multiple defendants, see note 215 *infra*.

¹⁸⁸ Appendix, Table I. About six percent of the nonprisoner § 1983 cases filed in the years 1975-1976 led to trial. Review of a sample of Central District civil cases terminated in 1978 revealed a similar percentage of trials. See Grossman, Kritzer, Bumiller & McDougal, *supra* note 184, at 106 (Table 6).

¹⁸⁹ Appendix, Table IV.

¹⁹⁰ Appendix, Table III.

ants do not file answers usually impose no major burden on the system or the defendants. In 1976, defendants filed answers in 69 of 136 cases,¹⁹¹ and in 1975 defendants filed answers in 76 of 140 cases.¹⁹² A further measure of the burden on litigants may be gleaned from the papers that they push. In 1976, district court records reveal depositions in 26 of 136 cases and interrogatories in 41 cases.¹⁹³ In 1975, 30 of 140 cases show depositions and 51 show interrogatories.¹⁹⁴

Some observers find the potential financial burden that section 1983 imposes on municipal and other official defendants as troublesome as the workload that section 1983 creates. For example, in *Owen v. City of Independence*, Justice Powell's dissenting opinion expressly relies on this fear to justify granting municipalities a good faith defense to section 1983 claims.¹⁹⁵ The 1975-1976 Los Angeles experience provides evidence of the past financial drain caused by section 1983. The study cannot, however, provide a complete picture of the financial burden that is borne by section 1983 defendants, in part because most cases in this study were completed prior to several recent decisions that will have an uncertain net effect on official liability. Although *Owen*, *Monell*, and *Maine v. Thiboutot* will tend to increase liability, other decisions, such as *Harlow v. Fitzgerald*,¹⁹⁶ *Lake Country Estates*, and part of *Butz v. Economou*, will have the opposite effect.¹⁹⁷ In addition, some settled cases in this study do not reveal the terms of settlement and some cases dismissed on plaintiffs' requests or by stipulation undoubtedly were the subject of out-of-court settlements not reflected in the district court records.

The available information suggests that there is not a large-scale shift of public funds to section 1983 plaintiffs. Plaintiffs achieved some

¹⁹¹ Appendix, Table IV.

¹⁹² Appendix, Table III. It should be noted that some cases generate substantial activity at the pre-answer stage.

¹⁹³ Appendix, Table IV. Most discovery takes place without an entry appearing in the district court records. Usually only contested discovery matters will appear on docket sheets. This severely limits the utility of the discovery figures in this, and in most other, studies.

¹⁹⁴ Appendix, Table III. In many cases, litigants filed depositions and served interrogatories as well. Such cases appear in both deposition and interrogatory statistics. In comparison, a study of Central District civil cases terminated in 1978 found at least one discovery event in 39.1% of the cases. Grossman, Kritzer, Bumiller & McDougal, *supra* note 184, at 108 (Table 7).

¹⁹⁵ 445 U.S. 622, 670 (1980) (Powell, J., dissenting). Justice Rehnquist made a similar point in dissent in *Monell*. 436 U.S. 658, 724 (1978). Recent hearings on proposed amendments to § 1983 emphasized the fiscal effects of civil rights litigation. *Hearings, supra* note 39, at 1 (statement of Sen. Hatch); *id.* at 40 (statement of Prof. Abernathy); *id.* at 74-75 (statement of Mr. Bates); *id.* at 516 (statement of Sen. Domenici). See also note 212 *infra*.

¹⁹⁶ 102 S. Ct. 2727 (1982).

¹⁹⁷ See notes 31-37 and accompanying text *supra*. *Harlow* makes it more difficult for plaintiffs to overcome the good faith defense of executive officials. 102 S. Ct. at 2737-39. *Lake Country Estates* extends absolute legislative immunity to certain unelected regional officials, see text accompanying notes 88-89 *supra*, and *Butz v. Economou* extends absolute judicial and prosecutorial immunity to certain administrative agency officials. 438 U.S. at 508-17.

measure of success—victory after trial,¹⁹⁸ settlement, injunctive relief, summary judgment, or dismissal by stipulation (which often reflects a settlement)—in 83 of the 276 cases,¹⁹⁹ and some of the settlements involved nonmonetary relief. In cases not involving employment discrimination claims, the settlements whose terms were revealed involved relatively minor amounts.²⁰⁰

Including employment discrimination cases in section 1983 statistics would overstate the burden imposed by section 1983. Title VII claims, which often are brought in the same proceeding as section 1983 employment discrimination claims, overshadow the section 1983 claims. *Griggs v. Duke Power Co.*²⁰¹ held that a Title VII plaintiff need not prove intent to discriminate to establish a Title VII violation. *Washington v. Davis*²⁰² requires that an intent to discriminate be shown in section 1983 discrimination cases based on the fourteenth amendment. Thus, since 1972, when Congress extended Title VII to public employers,²⁰³ it has been substantially easier to win a public employment discrimination case under Title VII than under section 1983. When litigants proceed under Title VII and section 1983, Title VII generates greater pressure

¹⁹⁸ Plaintiffs prevailed in five of the 17 trials shown in Tables I and II of the Appendix.

¹⁹⁹ Appendix, Tables I & II; note 198 *supra*. In cases in which the Court of Appeals for the Ninth Circuit reversed district court dispositions adverse to plaintiffs, the plaintiffs may still obtain some relief. See *Cohn v. Papke*, 655 F.2d 191 (9th Cir. 1981); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1981); *Hernandez v. City of Los Angeles*, 624 F.2d 935 (9th Cir. 1980); *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979). In at least three cases, higher tribunals overturned initial district court determinations favorable to plaintiffs. See *Cabell v. Chavez-Salido*, 102 S. Ct. 735 (1982); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981); *Manney v. Cabell*, 654 F.2d 1280 (9th Cir. 1980). In addition, some of the 19 cases dismissed by plaintiffs may have been settled.

²⁰⁰ *Garcia v. Armstrong*, Civ. No. 75-2975 (C.D. Cal. Nov. 14, 1978) (\$1,500); *Acierno v. Gorman*, Civ. No. 76-2182 (C.D. Cal., Jan. 16, 1978) (\$6,250); *Ochoa v. Simpson*, Civ. No. 76-1278 (C.D. Cal. Sept. 30, 1977) (\$2,500); *Nasser v. Coast Community College Dist.*, Civ. No. 76-615 (C.D. Cal. Aug. 22, 1977) (\$2,250); *Cherry v. Arnett*, Civ. No. 75-2881 (C.D. Cal. May 3, 1977) (undetermined future cost of compliance); *Swain v. Hemple*, Civ. No. 76-624 (C.D. Cal. Mar. 10, 1977) (\$500); *Garduno v. Effinger*, Civ. No. 75-1874 (C.D. Cal. Feb. 16, 1977) (\$999); *Cruz v. Berglund*, Civ. No. 75-3640 (C.D. Cal. Jan. 31, 1977) (\$2,500); *Chavez v. Piazza*, Civ. No. 75-30 (C.D. Cal. Apr. 12, 1976) (\$2,000); *Kerr v. Adler*, Civ. No. 75-2199 (C.D. Cal. Jan. 19, 1976) (\$1,500). See also *Gonzales v. McCuen*, Civ. No. 76-3519 (C.D. Cal. Jan. 4, 1982) (nominal damages; \$26,400 in fees awarded to plaintiff's attorneys). [Unless indicated as the date of filing, the dates included in the unpublished cases in this Article refer to the date of the most recent significant disposition by the court (usually dismissal).]

The largest financial drain may stem from institutional cases in which no direct money damages are awarded, but substantial costs nevertheless may be incurred to comply with judicially mandated changes. See text accompanying notes 292-305 *infra*. A Connecticut study of § 1983 police cases found "infrequent and diminutive" damage awards and settlements for "modest sums." Project, *supra* note 73, at 813. See also note 212 *infra*. Indirect costs such as city attorneys' salaries should also be considered. See generally *Hearings*, *supra* note 39, at 151, 587 (testimony about defense costs in § 1983 litigation).

²⁰¹ 401 U.S. 424 (1971).

²⁰² 426 U.S. 229 (1976).

²⁰³ Equal Employment Opportunity Act of 1972, § 2(1), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(a) (Supp. III 1979)).

on defendants than does section 1983. Indeed, employment discrimination cases comprise only about ten percent of the cases filed and generated nearly twenty percent of the cases in which section 1983 plaintiffs obtained any relief.²⁰⁴ Even including these Title VII cases, money payments of any kind were reported in fewer than twenty cases,²⁰⁵ although again it is reasonable to assume that unreported settlements would increase this figure.

There are two exceptions to the pattern of little or no financial recovery for section 1983 plaintiffs. In *Rivera v. City of Riverside*,²⁰⁶ a jury awarded approximately \$33,000 to nine Chicano plaintiffs based on gross misbehavior by the Riverside Police Department.²⁰⁷ In *Smiddy v. Varney*,²⁰⁸ plaintiff recovered \$250,000 in damages for being arrested without probable cause and for intentional concealment of exculpatory evidence.²⁰⁹ The court of appeals affirmed the finding of liability, but

²⁰⁴ Appendix, Tables I & II.

²⁰⁵ See cases cited in note 200 *supra* (monetary settlements in nonemployment actions); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated*, 436 U.S. 901 (1978), *on remand*, 490 F. Supp. 984 (C.D. Cal. 1980) (\$15,000 back pay awarded after trial in employment action), *rev'd*, 102 S. Ct. 735 (1982); Sias v. City Demonstration Agency, Civ. No. 75-4223 (C.D. Cal. Mar. 20, 1979), *remanded*, 588 F.2d 692 (9th Cir. 1978) (\$39,000 back pay awarded after trial); Lancaster v. California State Personnel Bd., Civ. No. 75-1890 (C.D. Cal. Mar. 23, 1977) (summary judgment for \$28,000 plus fees in employment action). In addition, several reported settlements of employment cases included monetary payments. Smith v. Trans World Airlines, Inc., Civ. No. 75-3257 (C.D. Cal. July 13, 1977) (\$4,500) (probably not a true § 1983 case); Humphreys v. St. Michaels Prep. High School, Civ. No. 76-1677 (C.D. Cal. Feb. 22, 1977) (\$2,000); Parrish v. Regents of the Univ. of Cal, Civ. No. 76-1494 (C.D. Cal. Nov. 2, 1976) (\$2,335); Martinez v. County of Ventura, Civ. No. 75-2075 (C.D. Cal. May 24, 1976) (\$3,366 in fees); Sterling v. Los Angeles County Unified School Dist., Civ. No. 75-185 (C.D. Cal. Jan. 9, 1976) (\$2,370 plus fees). Two police misconduct cases resulted in substantial monetary judgments after trial. See notes 206, 208 *infra*.

²⁰⁶ Civ. No. 76-1803 (C.D. Cal. Apr. 3, 1981) (consolidated on Oct. 8, 1976 with Alfaro v. City of Riverside, Civ. No. 76-1901 (C.D. Cal., filed June 14, 1976)). Viewed in light of the jury's findings for plaintiffs, the *Rivera* facts were as follows: a large number of police officers, using tear gas, physical force, and racial epithets, broke up an innocent party. In the course of doing so, the police drew their weapons, all but destroyed the dwelling they entered, and inflicted physical harm upon plaintiffs. See Complaint, *Rivera v. City of Riverside*, Civ. No. 76-1803 (C.D. Cal., filed June 4, 1976). In related state court proceedings, a California municipal court found that the police had acted without probable cause. *Id.*

²⁰⁷ To some degree, the \$33,000 figure presents an inflated picture of the monetary award in *Rivera*. In fact, there were a series of minor awards to nine plaintiffs against six defendants. The highest single award was for \$3,000 and the total of all awards was \$33,300. See *Rivera v. City of Riverside*, Civ. No. 76-1803 (C.D. Cal. Apr. 3, 1981) (order granting judgment). Plaintiffs also were awarded approximately \$245,000 in attorneys' fees, *id.*, and the defendant chose to appeal only the fees award, which was affirmed. See *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L. W. 3201 (U.S. Sept. 28, 1982).

²⁰⁸ Civ. No. 76-3390 (C.D. Cal., filed Oct. 20, 1976), *aff'd in part and vacated in part*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 4, 1982).

²⁰⁹ The damages were recovered from Los Angeles homicide detectives and a polygraph examiner. The detective defendants had arrested the plaintiff on charges of first-degree murder. The complaint alleges that the defendants had acted with malice, held the plaintiff

strongly hinted that the damages award should be substantially reduced.²¹⁰ Given their facts,²¹¹ and with the *Smiddy* award likely to be modified, neither case involves an excessive recovery by plaintiffs. Taken together, the two cases do not alter one's general impression about the impact of section 1983 litigation.²¹²

It is somewhat misleading even to speak of section 1983 cases filed by prisoners as burdening federal courts. In 1975, prisoners filed 125 section 1983 complaints. Fourteen prompted answers, three led to hearings of various types, four generated depositions, twelve generated interrogatories, and three led to trial.²¹³ In 1976, eighty-seven cases led to eleven answers, seven hearings, one deposition, seven sets of interroga-

without probable cause, and then concealed evidence that demonstrated the plaintiff's innocence. A lengthy trial resulted in findings of no probable cause to arrest and of other defects in the homicide investigation. 665 F.2d at 265.

²¹⁰ *Id.* at 266-68 (suggesting that plaintiff should not receive damages for most of the period for which damages had been awarded).

²¹¹ See notes 206, 209 *supra*.

²¹² Other reported substantial recoveries under § 1983 also suggest major breakdowns in law enforcement or other governmental functions. See, e.g., *Corriz v. Naranjo*, 667 F.2d 892 (10th Cir. 1981), *cert. granted*, 102 S. Ct. 2233 (1982); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION §§ 4.04-4.12 (1979 & Supp. 1980). But I have not made any systematic effort to analyze the results of § 1983 cases outside the Central District of California.

The National Institute of Municipal Law Officers (NIMLO) seems to have made the greatest effort to quantify the fiscal effects of § 1983 litigation. A 1981 survey by NIMLO revealed nearly five billion dollars in pending claims against 215 municipalities. *Hearings*, *supra* note 39, at 86 (NIMLO statement). By a rough process of extrapolation, NIMLO then estimated that \$780 billion in § 1983 claims were pending against all local governments in the United States. *Id.* at 87 n.18. The validity of relying on amounts claimed, rather than amounts recovered, to measure the fiscal impact of § 1983 litigation is, of course, highly suspect. *Id.* at 49 (statement of Prof. Steinglass).

NIMLO's own data supports a less apocalyptic view of the fiscal impact of § 1983 litigation. One of the questions on a NIMLO questionnaire sent to local governments asked the respondent to "[l]ist the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed." *Id.* at 155 (Exhibit A to NIMLO statement). Thirty-seven responses to the questionnaire were submitted to Congress. Of the 37 responding local governments, 22 reported no judgments or settlements in excess of one dollar, 10 others reported judgments or settlements totalling less than \$10,000, two reported judgments or settlements totalling between \$10,000 and \$25,000, and two reported judgments or settlements totalling between \$25,000 and \$50,000. *Id.* at 155-251 (responses to NIMLO questionnaire). As reproduced in the published hearings, Indianapolis, Indiana, appears to have reported a judgment or settlement of \$20 million. *Id.* at 221. When I asked the city's Corporation Counsel for further information about the case, however, his office reported that there must have been some sort of typographical error in the response or on the questionnaire. The city reported that total settlements and judgments against all city agencies have not exceeded \$400,000 in any of the last five years. Letter from Keith Kehlbeck, Administrative Assistant to the Corporation Counsel, to Theodore Eisenberg (May 26, 1982).

It should be noted that there are reports of damages awards that threaten serious financial difficulty for a few small municipalities. See *N.Y. Times*, May 30, 1982, § 1, at 21, col. 1.

²¹³ Appendix, Table V. Other studies of prisoner § 1983 cases reveal similar results. See

ries, and one settlement.²¹⁴ The remaining prisoner cases were dismissed²¹⁵ on the basis of magistrates' reports and recommendations, following what appeared to be pro forma review by a district judge.

What picture emerges of the burden of section 1983 cases? First, the sheer numbers are hardly overwhelming. In 1975-1976, the Central District of California had sixteen judgeships.²¹⁶ With a total of 488 prisoner and nonprisoner filings, the section 1983 cases constituted fifteen cases per judge per calendar year. By comparison, in fiscal year 1977, the Central District received a total of 377 filings per judgeship,²¹⁷ of which 279 were civil actions.²¹⁸ In fiscal year 1976, it received 369 filings per judgeship,²¹⁹ of which 260 were civil.²²⁰ If one assumes approximately 373 total filings per judgeship per calendar year and 270 civil filings per judgeship per calendar year, the section 1983 cases comprise 4.02% of all cases filed in the Central District and 5.56% of all civil cases filed there. But even these figures may be heavily discounted. If one discounts the figures to take account of cases in which no answer is filed and cases that are dismissed for lack of prosecution, the burden of section 1983 cases in the Central District seems within tolerable limits.²²¹

Another way to estimate the burden imposed by section 1983 cases is to compare it to the burden imposed by other classes of cases. Differ-

Bailey, *supra* note 182, at 531-36; Turner, *supra* note 182, at 661-63. For a cautionary note about the utility of the deposition and interrogatory figures, see note 193 *supra*.

²¹⁴ Appendix, Table V.

²¹⁵ In both prisoner and nonprisoner cases, a problem arises as to when to classify a case as having been dismissed or otherwise disposed of. Most filings encompass one or more plaintiffs bringing cases against many defendants. A civil rights plaintiff may, for example, name as defendants individual police officers, their supervisors, the police department, the city, and the state. In almost all cases, some defendants were dismissed relatively early. This study classifies a case's disposition by the result least favorable to the defendants. Thus, a § 1983 case in which four defendants achieve dismissal on the pleadings and one defendant must stand trial is classified as a case disposed of at trial—a classification which avoids understating the success rate of § 1983 actions. It seems reasonable to assume that most plaintiffs view a civil rights case as successful when they achieve a substantial settlement or judgment against one defendant, regardless of the number of defendants originally named in the complaint.

²¹⁶ MANAGEMENT STATISTICS 1977, *supra* note 183, at 103.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ MANAGEMENT STATISTICS 1976, *supra* note 183, at 103.

²²⁰ *Id.* By comparison, in fiscal year 1976, the California superior courts reported 1,283 filings per judgeship of which approximately 1,138 were original, civil, non-habeas corpus filings. JUDICIAL COUNCIL OF CAL., ANNUAL REPORT OF THE ADMIN. OFF. CAL. CTS. 196, 198 (1977) (Tables XVI & XVII). In fiscal year 1976, the State of Maryland reported 1,068 civil filings per judgeship, ADMINISTRATIVE OFF. OF THE CTS., MARYLAND, ANNUAL REPORT 1975-1976, at 80, and the State of Illinois reported 5,746 filings per judgeship in calendar year 1976. ADMINISTRATIVE OFF. OF THE ILLINOIS CTS., 1976 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS, at 113 (not distinguishing between civil and criminal filings).

²²¹ Similar conclusions have been reached in studies of prisoner cases. See Bailey, *supra* note 182, at 544-47 (studying cases in the Northern District of Illinois); Turner, *supra* note 182, at 637, 662 (national study).

ences in data bases and information-gathering techniques, however, make even superficially valid comparisons hard to find and of modest statistical value. Unlike this study, few studies follow to completion all cases filed in a particular year. Most statistical case collections merely provide information as to what happens to cases during a particular year without regard to filing date. Nevertheless, the comparisons may be of some value and, for the moment, they are all we have.

When the relative burden is measured by the percent of filed cases that go to some form of trial, the Central District's section 1983 cases probably are substantially less burdensome than civil cases filed in California's superior courts, the principal state courts of general jurisdiction. In fiscal year 1976, trials of some form occurred in about forty-eight percent of the total number of cases heard in superior court.²²² The corresponding figure for section 1983 cases must be substantially lower.²²³ Another pair of numbers suggests a similar pattern: In fiscal year 1976, cases dismissed for lack of prosecution comprised less than 1.5% of the civil cases filed in superior court,²²⁴ while of cases filed in the Central District in calendar years 1975 and 1976, twelve percent of the nonprisoner section 1983 cases were dismissed for lack of prosecution.²²⁵

The pace of litigation is another measure of the burden of section 1983 cases. By this measure, section 1983 cases seem slightly more burdensome than some other cases. A study of a sample of Central District civil cases terminated in 1978 found that 55.1% had lasted more than six months, 31.8% more than twelve months, and 11.3% more than twenty-four months.²²⁶ Of the nonprisoner section 1983 cases commenced in

²²² NATIONAL CENTER FOR STATE CTS., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1976, at 169. Almost two-thirds of all cases disposed of in superior court in fiscal year 1976 required a jury trial or a court hearing. JUDICIAL COUNCIL OF CAL., *supra* note 220, at 202. In fiscal year 1976, Maryland reports that trials accounted for 18.3% of all dispositions in law cases, with jury trials accounting for approximately one-third of those cases disposed of by trial. ADMINISTRATIVE OFF. OF THE CTS., MARYLAND, *supra* note 220, at 87. In another study, however, in a sample of cases terminated in 1978, only 3.2% of all cases in the Downtown Branch of Los Angeles Superior Court went to trial. Grossman, Kritzer, Bumiller & McDougal, *supra* note 184, at 106 (Table 6). The disparity between the 1978 Los Angeles figures and the 1976 California figures increases skepticism about relying on statistics too hastily to reach conclusions about the nature of litigation.

Another comparison demonstrates the flexibility of the numbers in this area. If one measures the burden of litigation by the occurrence of *jury* trials rather than by the number of trials of any kind, the impression of the burden of § 1983 changes drastically. In fiscal year 1976, jury trials occurred in cases comprising less than one percent of the total number of cases filed in California's superior courts. NATIONAL CENTER FOR STATE CTS., *supra*, at 198. Given the relatively small number of § 1983 trials, jury trials in only two or three cases would make § 1983 appear to lead to proportionately more jury trials than California's state civil litigation.

²²³ Appendix, Tables I & II. The Tables show that only 17 of over 270 nonprisoner cases filed in 1975-1976 led to a trial.

²²⁴ NATIONAL CENTER FOR STATE CTS., *supra* note 222, at 169.

²²⁵ Appendix, Tables I & II.

²²⁶ Grossman, Kritzer, Bumiller & McDougal, *supra* note 184, at 95 (Table 3a). The 1978

calendar years 1975-1976, 65.6% lasted more than six months, 40.6% more than twelve months, and 17.0% more than twenty-four months.²²⁷ A more direct comparison between section 1983 cases and civil cases generally reveals a similar pattern. Court management statistics for fiscal year 1976 indicate that the median time for disposition for all civil cases in the Central District was seven months.²²⁸ The nonprisoner section 1983 cases found in this study had a median disposition time of eight months.²²⁹

C. *The Actual Number of Section 1983 Cases*

A final problem attends relying on the number of section 1983 cases as a reason for reshaping civil rights doctrine. The simple fact is that we have no idea how many section 1983 cases are filed in the nation each year. The present study of the Los Angeles experience suggests that the number of cases is only a fraction of what many of us have believed.

Nearly all widely-quoted national data on the effect of section 1983 on the federal court workload stems from information gathered by the Administrative Office of the United States Courts. As some commentators note, the data on "civil rights" cases do not distinguish between cases filed under section 1983 and cases filed under other civil rights provisions.²³⁰ For the reasons that follow, an educated guess would be that section 1983 cases constitute only about one-third, and certainly not more than one-half, of the cases the Administrative Office classifies as civil rights cases.

Although statistical data on civil rights cases published by the Administrative Office is presented on a fiscal year basis, that Office was able to furnish us with a computer tape containing its data for non-prisoner and prisoner civil rights cases filed in the Central District in calendar years 1975 and 1976. The data show, for 1975 and 1976 respectively, 313 and 368 total nonprisoner civil rights cases, broken down into subcategories as follows:

study excluded cases defined as "too large" or "too small," and it imposed other limitations that restrict its utility for present purposes. *Id.* at 97-98.

²²⁷ Appendix, Table VIII.

²²⁸ MANAGEMENT STATISTICS 1976, *supra* note 183, at 103.

²²⁹ This figure ignores activity after initial disposition by the district court. In fact, the median disposition time varied widely between 1975 and 1976. For calendar year 1975, the median time was approximately seven months; for calendar year 1976, it was nearly ten months.

²³⁰ See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 39, at 950 n.3; Schuck, *supra* note 2, at 283 n.2; Whitman, *supra* note 173, at 6 n.9. See also ADMINISTRATIVE OFF. U.S. CTS., 1979 ANNUAL REPORT OF THE DIRECTOR A-14 (1979) (containing subject-matter breakdown of "civil rights" actions). Examination of any recent subject-matter breakdown of civil rights cases indicates that employment claims constitute a huge fraction of all civil rights cases. See, e.g., *id.* Moreover, actions against private employers could not be § 1983 cases and actions against public employers often are not "true" § 1983 cases. See text accompanying notes 201-05 *supra*.

TABLE A

*Civil Rights Filings in the Central District of California*²³¹

	Calendar Year 1975	Calendar Year 1976
Other Civil Rights	172	187
Voting	1	0
Jobs	120	162
Accommodations	16	18
Welfare	4	1
Totals	313	368

In comparison, our study found 140 nonprisoner section 1983 cases in 1975 and 136 such cases in 1976. Most of the discrepancy between the Administrative Office's figure for total civil rights cases and our figures for section 1983 cases can be explained by the fact that many civil rights cases are filed under some provision other than section 1983. Not all cases that the Administrative Office includes in the "other Civil Rights" category are section 1983 cases. The "other Civil Rights" category seems to include, in addition to section 1983 cases, similar cases against federal defendants,²³² housing discrimination cases based on Title VIII,²³³ cases based on section 1985,²³⁴ cases brought under section 1981,²³⁵ and some miscellaneous claims.²³⁶

In the Administrative Office categories other than the "other Civil Rights" category, only job discrimination claims generated a substantial number of civil rights filings. But the vast majority of these filings are not based on section 1983. In the course of looking for section 1983 cases, our study detected many Title VII cases. Even though we did not systematically search for such cases, Title VII seemed to generate at least as many cases as section 1983. Because the purpose of the study encompassed only Title VII cases that were also section 1983 cases, we did not dig deeper at the time. When one adds the number of nonsection 1983 "other Civil Rights" cases filed to the number of private Title

²³¹ Computer Tape No. 177, Filings for 1975 & 1976 in Central California Civil Rights Cases (furnished by Administrative Off. U.S. Cts.).

²³² ADMINISTRATIVE OFF. U.S. CTS., STATISTICAL CODES FOR CIVIL REPORTS SUBMITTED BY CLERKS OF COURT 1 (1980).

²³³ See *Brooks v. Chris*, Civ. No. 76-2962 (C.D. Cal., filed Sept. 17, 1976) (housing cases classified on computer printout as "other Civil Rights" cases); *Durns v. Hill*, Civ. No. 76-731 (C.D. Cal., filed Mar. 4, 1976).

²³⁴ See *Flannigan v. Trans World Airlines, Inc.*, Civ. No. 76-1113 (C.D. Cal., filed Apr. 6, 1976) (§ 1985 cases classified on the computer printout as "other Civil Rights" cases); *Cox v. Sieroty*, Civ. No. 76-137 (C.D. Cal., filed Jan. 13, 1976).

²³⁵ See *Destefano v. Ringsby United*, Civ. No. 76-253 (C.D. Cal., filed Jan. 21, 1976) (§ 1981 case classified on the computer printout as "other Civil Rights" case).

²³⁶ See *UN Teachers v. Los Angeles*, Civ. No. 76-1672 (C.D. Cal., filed June 2, 1976) (miscellaneous claims classified on the computer printout as "other Civil Rights" cases); *Lefler v. Anastaci*, Civ. No. 76-1052 (C.D. Cal., filed Mar. 30, 1976).

VII claims, most of the differences between the Administrative Office's statistics and this study's findings disappear.²³⁷

Employment cases, most of which are brought under Title VII, have played such a significant role in the growth of civil rights litigation that they deserve special mention. As the figures from the Administrative Office in Table A and the results of this study suggest, there are about as many employment discrimination cases filed in Los Angeles as there are section 1983 cases. On a nationwide basis for fiscal years 1973 through 1981, nearly sixty percent of the increase in all civil rights case filings is attributable solely to the growth of employment discrimination cases.²³⁸ The central role of Title VII cases also suggests that critics of section 1983 have used civil rights statistics in an oversimplified manner. Commentators often point to the growth of civil rights cases by relying on a comparison between 1960 or 1961 and some recent year.²³⁹ Because there were no Title VII cases nor virtually any other civil rights cases against private parties in the early 1960s, it is questionable whether these are appropriate base years for the purpose of comparison with more recent years. To the extent that the recital of statistics is meant to

²³⁷ Of course, part of the discrepancy between the Administrative Office's "total civil rights" figures and the number of § 1983 cases that we found may be attributable to our failure to detect every § 1983 case filed in the Central District in calendar years 1975 and 1976. Although we probably missed some § 1983 cases, for the reasons that follow it is unlikely that we missed enough to change the overall impression of § 1983 cases in Los Angeles.

Although some overlap exists with other subcategories, the vast majority of nonemployment § 1983 cases are included in the Administrative Office's "other Civil Rights" subcategory. To help assure the study's completeness, I obtained copies of the complaint and the docket entries for each "other Civil Rights" case listed on the Administrative Office's computer printout (except those that contained federal defendants) that was not found in our case-by-case search or by other means. These cases were then incorporated into the study. This checking process assures that virtually every nonemployment § 1983 case included in the Administrative Office's civil rights statistics is included in the study. I did not obtain copies of the complaint and docket entries for "other Civil Rights" cases that the Administrative Office's computer printout indicated involved a federal defendant because these cases rarely are § 1983 cases. This means that § 1983 cases that were brought against state and federal officials, that were classified by the Administrative Office as being against a federal defendant, and that were not found in our own case-by-case search of the district court files are not included in the study.

For prisoner civil rights cases, the computer printout revealed 135 cases with no federal defendant for 1975 and 88 such cases for 1976. Our study found 125 prisoner § 1983 cases in 1975 and 87 such cases in 1976. Because the Administrative Office does not distinguish between prisoner § 1983 cases and other civil rights actions filed by prisoners, the study's findings seem reasonably complete. A few cases that the Administrative Office characterized as prisoner cases were classified in our study as nonprisoner cases, and a few cases classified by us as prisoner cases were classified by the Administrative Office as nonprisoner cases, but the discrepancies are small enough to leave the basic conclusions intact.

²³⁸ See ADMINISTRATIVE OFF. U.S. CTS, 1981 ANNUAL REPORT OF THE DIRECTOR 75.

²³⁹ See, e.g., *Hearings*, *supra* note 39, at 559 (statement of Mr. Wilkinson); *id.* at 587 (statement of Mr. Edmisten); *id.* at 599 (statement of Mr. Hink); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 39, at 950 n.3; T. EISENBERG, *supra* note 39, at 74.

suggest something about the growth of section 1983, use of 1961 as a base year is misleading.

In short, the Administrative Office statistics for the total number of civil rights cases cannot be used indiscriminately to measure the number of, or long-term growth of, section 1983 cases. Dividing the Administrative Office's figure by two, or even three, probably would yield a more accurate estimate of the number of section 1983 cases.²⁴⁰

D. *The Nature of Section 1983 Cases*

Many judges appear concerned about the nature as well as the number of section 1983 cases. Usually willing to acknowledge the need for a federal remedy in what they consider important cases, they balk at the application of section 1983 to cases in which they detect little or no federal interest. Thus in *Parratt v. Taylor*, Justice Powell objected to constitutional law being trivialized,²⁴¹ a theme echoed in the lower courts.²⁴²

This attitude stems from several factors. First, section 1983 has been interpreted since *Monroe* to contain no internal limitations on the types of constitutional claims that may be brought under it. It is, therefore, natural to assume that every conceivable federal claim finds its way into court with the aid of section 1983. Second, those concerned about the character of section 1983 litigation draw support from uncritical reliance on the numbers. Somehow the volume of section 1983 litigation translates into use of section 1983 to bring the "wrong" kind of case. Unwilling to look behind these numbers, the judge needs only slight anecdotal evidence to conclude that section 1983 is a source of abuse. The evidence may consist of a case or two of his own in which federal interests seemed minor, or courthouse scuttlebutt may suffice.

The Los Angeles cases examined in this study suggest that this perception of section 1983 is flawed. On their surfaces, a large majority of the nonprisoner section 1983 complaints asserted important interests. Of the 276 nonprisoner cases, 117 alleged unlawful arrest, assault or battery by the police, and/or unlawful search and seizure.²⁴³ Another

²⁴⁰ Doubts about the number of § 1983 cases may lead some to recharacterize the concern about caseloads as encompassing all civil rights cases rather than just § 1983 cases. This would seem to require added analysis of the desirability of Title VII cases and other non-§ 1983 actions supported by civil rights statutes. To date, however, the concern about caseload rarely is phrased in such a discriminating fashion.

²⁴¹ 451 U.S. at 554 n.13. See also P. BATON, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 39, at 233 (Supp. 1981).

²⁴² See note 168 *supra*.

²⁴³ Appendix, Tables I & II. These categories of police misconduct cases contain a degree of arbitrariness. Many plaintiffs allege combinations of misbehavior that overlap categories such as "false arrest" or "assault." I have tried to categorize these cases by the "essence" of the complaints. If the three major subcategories of police misconduct cases (false arrest, assault and battery, and unlawful search and seizure) are grouped together, no distortion is

twenty-four cases alleged malicious prosecution or judicial error in earlier proceedings.²⁴⁴ Plaintiffs in twenty-one cases asserted first amendment violations and forty-six charged employment discrimination or some other form of discrimination.²⁴⁵ Challenges to the constitutionality of ordinances, statutes, or similar policies (a category that overlaps with other categories) arose in eighteen cases.²⁴⁶ Thirty-three cases involved due process claims and twenty-seven fell into the inevitable "miscellaneous" category.²⁴⁷ Even within the due process and miscellaneous categories, where one might expect bizarre-sounding applications of section 1983, there were relatively few claims involving no significant federal interest.²⁴⁸ Within the limits of what one may glean from complaints, the general picture is clear: The vast majority of non-prisoner section 1983 cases involve classic rights of obvious importance; the trivial claims are a sideshow.

Looking beyond the face of the complaint to ascertain more about the nature of section 1983 cases reinforces the conclusion that section 1983 cases usually involve important constitutional claims. The litigants and courts take most seriously those cases involving deprivation of rights by the police. The 117 police misconduct cases generated thirty-three settlements or trials and nineteen dismissals by stipulation.²⁴⁹ Excluding employment discrimination cases as not raising true section 1983 claims,²⁵⁰ the 130 cases not involving police misconduct generated seventeen settlements or trials and eight dismissals by stipulation, a "success" rate less than half that of police misconduct cases.²⁵¹

Section 1983 prisoner cases are more difficult to assess than non-prisoner cases. The complaints are often difficult to comprehend and in a large majority of cases the records terminated with the filing of the complaints, making it difficult to determine the seriousness of the claims. Nevertheless, the study provides some sense of the nature of section 1983 prisoner litigation. Not surprisingly, prisoners' claims reflect three principal concerns: the circumstances leading to incarceration, the

introduced by deeming a case to be an "assault" case when it also may be viewed as a "false arrest" case.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See notes 263-64 *infra*.

²⁴⁷ Appendix, Tables I & II.

²⁴⁸ Those that seemed frivolous include *Johnson v. California*, Civ. No. 76-2107 (C.D. Cal., filed July 1, 1976); *Bennet v. County of Ventura*, Civ. No. 76-1984 (C.D. Cal., filed Sept. 29, 1976) (miscellaneous claims dismissed due to incomprehensible pleadings).

²⁴⁹ Appendix, Tables I & II. This assumes that dismissals by stipulation reflect the existence of out-of-court settlements. In the District of Connecticut from 1970 through 1977, plaintiffs achieved trial, settlement, or dismissal by stipulation in 73 of 89 closed cases. Project, *supra* note 73, at 790 (Table I). Twenty-three of the trials resulted in verdicts for the defendant. *Id.*

²⁵⁰ See notes 201-09 and accompanying text *supra*.

²⁵¹ Appendix, Tables I & II.

conditions of incarceration, and proceedings relating to termination of imprisonment. More than one-fifth of the cases involved attacks on some aspect of the legal proceedings that led to incarcerations.²⁵² Almost one-half of the cases raised questions about treatment or discipline in prison, with claims of medical mistreatment comprising the largest single category of claims.²⁵³ Some aspect of parole or probation decisionmaking was contested in another thirteen percent of the cases.²⁵⁴ Ten percent of the complaints asserted undue restrictions on access to court.²⁵⁵

As is true of nonprisoner cases, most prisoner section 1983 complaints were not plainly trivial assertions implicating little or no federal interest. The largest and perhaps most controversial class of claims, that involving prison conditions, has generated too much serious litigation to dismiss as being of little federal interest. Indeed, in three Central District federal institutional cases courts found constitutional flaws in many of the prison practices that most inmates challenge on a piecemeal basis.²⁵⁶ Claims involving the circumstances leading to incarceration or the conditions of release assert wrongful deprivations of freedom. Most such allegations may, if litigated, prove unfounded, but the cases rarely progress far enough to allow confident conclusions about their merits. The ultimate truth or falsity of allegations in section 1983 cases, however, is not yet a debated issue. The issue is the nature and volume of these cases.

E. Judicial Performance in Section 1983 Cases

So much discussion about section 1983 focuses on numbers that less quantifiable features often are overlooked. Although constantly bombarded with citations to the number of civil rights cases, we are told relatively little about those cases. The Los Angeles experience suggests more than that section 1983 is used mainly to assert important federal claims; that experience can also be used to assess the quality of judicial treatment of section 1983 cases.

Few shocking failures of justice leap out from the case records. With some exceptions, courts consistently provide at least arguable theoretical justification for their actions. Of course, given the array of immunities upon which courts may rely, it is not difficult to find a

²⁵² Appendix, Table VI.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See* Rutherford v. Pitchess, 457 F. Supp. 104 (C.D. Cal. 1978) (Los Angeles County Central Jail conditions); Stewart v. Gates, 450 F. Supp. 583 (C.D. Cal. 1978) (Orange County Jail conditions). *See also* Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980) (ordering district court to abstain from hearing action challenging conditions at Central Juvenile Hall in Los Angeles).

doctrinal basis for dismissing nearly any section 1983 action. Nevertheless, the cases leave an impression of less-than-satisfactory performance. The principal problem appears to be more one of attitude than of gross misapplication of doctrine. On the many issues where a judge's discretion is determinative, unarticulated attitudes are more important than precedent; and on such issues judges seem unsympathetic to civil rights plaintiffs. One's impression is that courts are looking for ways to dismiss cases—the only question is how to do so. To illustrate this concern, it is helpful to focus on areas in which judicial discretion plays a central role.

1. *Abstention*

Both the nature of abstention and the Supreme Court's vague and sometimes conflicting guidelines in the area²⁵⁷ leave much of the abstention decision to the district judge's discretion. To justify abstention under the Court's decision in *Railroad Commission v. Pullman Co.*,²⁵⁸ a case must present an unclear question of state law that, once resolved, may eliminate the need to decide a federal constitutional issue. Early in the litigation the judge must predict the issues upon which he believes the case will turn. If his prediction reveals a particular combination of state and federal issues, abstention is possible. Because so much turns on the judge's view of the case, *Pullman* abstention offers federal courts the sometimes irresistible opportunity to decline to hear cases they do not wish to hear. Within limits, *Younger v. Harris*,²⁵⁹ which prohibits federal court interference with certain state proceedings, furthers this opportunity. At least one commentator has suggested²⁶⁰ that a review of published cases raises doubts about federal judges' knowledge or candor in applying these doctrines. The unreported Los Angeles cases in this study provide further cause for concern about the spirit in which federal courts apply the abstention doctrines.

The raw figures on the incidence of *Pullman* and *Younger* abstention are not alarming. Of the 276 nonprisoner civil rights cases filed in 1975-1976, Los Angeles federal judges abstained or relied on abstention like considerations in only thirteen cases.²⁶¹ However, in cases involving at-

²⁵⁷ See C. WRIGHT, A. MILLER & E. COOPER, 17 FEDERAL PRACTICE AND PROCEDURE § 4242, at 459-60 (1978); Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 602-04 (1977).

²⁵⁸ 312 U.S. 496, 498 (1941).

²⁵⁹ 401 U.S. 37 (1971).

²⁶⁰ See Field, *supra* note 257, at 602.

²⁶¹ *Varguas v. McNally Enters., Inc.*, Civ. No. 75-3599 (C.D. Cal., abstention ordered Dec. 29, 1975; dismissed Sept. 1, 1979); *Lampel v. County of Los Angeles*, Civ. No. 76-2454 (C.D. Cal., abstention ordered Mar. 14, 1977; dismissed Oct. 25, 1977); *Newport Invs., Inc. v. City of Laguna Beach*, Civ. No. 76-1514 (C.D. Cal. Jan. 3, 1977), *aff'd*, 564 F.2d 893 (9th Cir. 1977); *Mission Hills Ranch, Inc. v. City of San Juan Capistrano*, Civ. No. 76-2111 (C.D. Cal. Sept. 23, 1976); *Wilken v. Jones*, Civ. No. 76-2311 (C.D. Cal. Sept. 13, 1976); *Butker v. Department of Alcoholic Beverage Control*, Civ. No. 76-1627 (C.D. Cal. June 16, 1976); *Family*

tacks on statutes, ordinances, or similar official policies—the primary class of cases in which abstention is a serious possibility²⁶²—courts seem to be straining to abstain. In 1975-1976, Los Angeles federal judges were presented with eighteen such challenges, eleven of which plaintiffs pursued seriously.²⁶³ Others either were not pursued by plaintiffs or were dismissed without prejudice or at plaintiff's request.²⁶⁴ Of the eleven cases that were pursued seriously, one was settled,²⁶⁵ three others offered virtually no ground for *Pullman* or *Younger* abstention,²⁶⁶ and one

Food Servs., Inc. v. Stouff, Civ. No. 75-3370 (C.D. Cal. Dec. 15, 1975); Rohm v. Davis, Civ. No. 75-3523 (C.D. Cal., abstention ordered Oct. 21, 1975; dismissed Nov. 11, 1975). *See also* Rivera v. State Bar of Cal., Civ. No. 76-2655 (C.D. Cal. Mar. 24, 1978) (challenge to state bar disciplinary proceedings); Hollywood Fox Club v. Davis, Civ. No. 75-4215 (C.D. Cal. Feb. 22, 1977) (federal proceedings stayed while plaintiff pursued similar action in state court); Ripston v. Pitchess, Civ. No. 75-3549 (C.D. Cal. Jan. 20, 1976) (refusal to limit courtroom security measures imposed by judge presiding in state criminal trial of third parties); Adams v. Wiley, Civ. No. 75-3050 (C.D. Cal. Nov. 20, 1975) (child custody matters should be referred to state courts); Krain v. Regents of the Univ. of Cal., Civ. No. 75-2271 (C.D. Cal. July 3, 1975), *aff'd*, No. 75-2853 (9th Cir. July 17, 1978) (abstention proper where plaintiff initially filed in state court and later brought essentially same action in federal court). Some cases in which courts relied on abstention-like considerations did not result in formal abstention. Hence, only 11 of the cases cited in this footnote appear in Tables I and II as cases disposed of by "abstention."

²⁶² *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 257, § 4242, at 453.

²⁶³ Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated*, 436 U.S. 901 (1978), *on remand*, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982); Lampel v. County of Los Angeles, Civ. No. 76-2454 (C.D. Cal., abstention ordered Mar. 14, 1977; dismissed Oct. 25, 1977); Citizens Legal Defense Alliance, Inc. v. Mathews, Civ. No. 76-1614 (C.D. Cal. June 28, 1977), *aff'd*, 610 F.2d 661 (9th Cir. 1979) (consolidated with Zaslewsky v. Board of Educ., Civ. No. 76-2472 (C.D. Cal., filed Aug. 3, 1976), *aff'd*, 610 F.2d 661 (9th Cir. 1979)); Newport Invs., Inc. v. City of Laguna Beach, Civ. No. 76-1514 (C.D. Cal. Jan. 4, 1977), *aff'd*, 564 F.2d 893 (9th Cir. 1977); Corby v. Brone, Civ. No. 73-3319 (C.D. Cal. July 11, 1977); Dubois v. Department of Water & Power, Civ. No. 76-1031 (C.D. Cal. Nov. 3, 1976); Mission Hills Ranch, Inc. v. City of San Juan Capistrano, Civ. No. 76-2111 (C.D. Cal. Sept. 23, 1976); Wilken v. Jones, Civ. No. 76-2311 (C.D. Cal. Sept. 13, 1976); Butker v. Department of Alcoholic Beverage Control, Civ. No. 76-1627 (C.D. Cal. June 11, 1976); Goodell v. California Interscholastic Fed'n, Civ. No. 75-2919 (C.D. Cal. Apr. 23, 1976); Rohm v. Davis, Civ. No. 75-3523 (C.D. Cal., abstention ordered Oct. 21, 1975; dismissed Nov. 11, 1975).

²⁶⁴ *See, e.g.*, Desert Outdoor Advertising, Inc. v. California, Civ. No. 76-2889 (C.D. Cal. Mar. 7, 1977); Niyi v. Superior Court, Civ. No. 76-4063 (C.D. Cal., Feb. 16, 1977); Citizens Legal Defense Alliance, Inc. v. California, Civ. No. 76-3195 (C.D. Cal., motion to dismiss denied Jan. 28, 1977); Baktapriya v. Trusel, Civ. No. 76-3304 (C.D. Cal., Oct. 22, 1976); California Divorce League v. Van de Camp, Civ. No. 76-1039 (C.D. Cal., dismissed on res judicata grounds July 23, 1976); International Soc'y for Krishna Consciousness, Inc. v. Rucker, Civ. No. 76-1843 (C.D. Cal. July 15, 1976); Halford v. Sillas, Civ. No. 76-0636 (C.D. Cal. Apr. 22, 1976).

²⁶⁵ Goodell v. California Interscholastic Fed'n, Civ. No. 75-2919 (C.D. Cal. Apr. 23, 1976).

²⁶⁶ Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated*, 436 U.S. 901 (1978), *on remand*, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982) (challenge to state statute requiring peace officers to be United States citizens); Citizens Legal Defense Alliance, Inc. v. Mathews, Civ. No. 76-1614 (C.D. Cal. June 28, 1977) (challenge to school board rules pertaining to the assignment of teachers to achieve racial balance); DuBois v. Department of Water & Power, Civ. No. 76-1031 (C.D. Cal. Nov. 3, 1976) (challenge to city

went to trial despite a possible basis for *Pullman* abstention.²⁶⁷ In each of the remaining six cases, abstention was ordered. In none of the cases was abstention clearly mandated and in some it seemed erroneous. Although the sample is too small to support firm conclusions, the results warrant careful monitoring of judicial performance in this area.

Courts abstained in three cases attacking land use controls.²⁶⁸ None of the judges in these cases specified the unclear question of state law that supported abstention.²⁶⁹ Whether or not the failure to so spec-

charter provision mandating retirement at age 65). In each case, neither the docket entries nor the defendants' answers indicate that the defendants requested the court to abstain. See Defendant's Answer to First Complaint As Modified, *Chavez-Salido v. Cabell*, 427 F. Supp. 158 (C.D. Cal. 1977); Answer to Complaint, *Citizens Legal Defense Alliance, Inc. v. Mathews*, Civ. No. 76-1614 (C.D. Cal. June 28, 1977); *id.* (Answer to First Amended and Supplemental Complaint); Answer to Complaint for Declaratory Relief Preliminary Injunction and Damages, Violation of Civil Rights, *DuBois v. Department of Water & Power*, Civ. No. 76-1031 (C.D. Cal. Nov. 3, 1976).

²⁶⁷ *Corby v. Brone*, Civ. No. 76-3319 (C.D. Cal. July 11, 1977) (constitutional attack on statute and resolution limiting public employee participation in employee organizations).

²⁶⁸ *Lampel v. County of Los Angeles*, Civ. No. 76-2454 (C.D. Cal., abstention ordered Mar. 14, 1977; dismissed Oct. 25, 1977); *Newport Invs., Inc. v. City of Laguna Beach*, Civ. No. 76-1514 (C.D. Cal. Jan. 3, 1977), *aff'd*, 564 F.2d 893 (9th Cir. 1977); *Mission Hills Ranch, Inc. v. City of San Juan Capistrano*, Civ. No. 76-2111 (C.D. Cal. Sept. 23, 1976).

²⁶⁹ See *Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893, 894 (9th Cir. 1977); *Mission Hills Ranch, Inc. v. City of San Juan Capistrano*, Civ. No. 76-2111 (C.D. Cal. Sept. 23, 1976). In *Mission Hills Ranch*, however, the defendants did present a detailed, colorable case for abstention. See *id.* (Memorandum of Points and Authorities in Support of Motion to Abstain From the Exercise of Jurisdiction (filed Aug. 18, 1976)). The judge indicated orally that zoning matters should be decided initially by the state court, a view that may have been influenced by the plaintiff's concurrent filing of a state court action. Letter from Royal M. Sorensen, counsel for the plaintiff, to Theodore Eisenberg (dated Dec. 4, 1981) (on file with the *Cornell Law Review*). The state court proceeding was settled. *Id.* In *Lampel v. County of Los Angeles*, Civ. No. 76-2454 (C.D. Cal., abstention ordered Mar. 14, 1977; dismissed Oct. 25, 1977), the defendants argued only that land use is a matter of state and local concern and never specified the crucial unclear question of state law. See *id.* (Memorandum of Points and Authorities at 16-17 (filed Aug. 31, 1976)). The Magistrate's Proposed Report injected into the case state law issues that neither party had raised, and it did so in a summary fashion without supplying the slightest evidence that the state law claims raised by the magistrate were sufficiently unclear to offer plaintiffs any significant chance of success in state court:

Government Code § 6500 et seq. provides authority for municipal governments to enact ordinances such as the parking ordinances involved in this case. It is entirely possible that the state courts could conclude that the parking ordinances in question were not adopted in compliance with the provisions of the Government Code. Moreover, since the California Constitution contains both a due process and equal protection clause . . . it is entirely possible that the California courts will conclude that the ordinances in question are violative of one or both of these state constitutional provisions. . . . The third test, i.e., that the "possibly determinative issue of state law is doubtful" also appears to be satisfied. Thus, the Magistrate has been unable to discover any state court decision, and none has been called to his attention, interpreting the ordinances in question. It seems to the Magistrate that it would be prudent for this Court to afford the state courts the first opportunity to interpret these ordinances.

Id. (Proposed Report and Recommendation As to Civil Rights Complaint 10-11 (filed Apr. 14, 1977)). Strangely, the magistrate failed to look for decisions interpreting the government code and the state constitution—the very provisions that he found sufficiently unclear to be

ify amounts to reversible error²⁷⁰—the doctrine leaves much to the district court's discretion—failing to identify the unclear issue of state law undermines much of the rationale for *Pullman* abstention. If the state court that hears the case does not resolve the issue that relates to the federal constitutional question,²⁷¹ the entire abstention process becomes a waste. The failure to specify unclear questions of state law suggests that federal judges lack familiarity with the abstention doctrine or that their eagerness to dispose of cases outweighs any legitimate effort to adhere to established doctrine.

The fourth and fifth abstention cases involved challenges to allegedly overbroad ordinances regulating nude entertainment.²⁷² Attacks on such ordinances often are poor candidates for abstention, for state courts are unlikely to be able to resolve in the course of a single proceeding the first amendment problems that attend such statutes. Where a series of clarifying state cases may be necessary to resolve the state issue, the Supreme Court has indicated that abstention should be disfavored.²⁷³ Yet in one of the Los Angeles cases the judge strained to find an unclear question of state law,²⁷⁴ and in the other the court merely

potentially dispositive of plaintiffs' claims. Ironically, in a case clearly falling within federal jurisdictional grants, the magistrate suggested to the plaintiffs that "federal courts are courts of limited jurisdiction and that litigants suffer many different kinds of grievances which cannot or should not be tried in the federal courts, at least at the time the litigants desire them to be tried." *Id.* at 12. The court, following the magistrate's recommendation, ordered abstention pending resolution in state court of state-law issues. *See id.* (Magistrate's Final Report and Recommendation (filed Apr. 14, 1977)); *id.* (Judgment entered Apr. 18, 1977).

For discussions of the propriety of abstaining from land use cases under *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976) or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), see *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir.), *cert. denied*, 102 S. Ct. 2270 (1982); Note, *supra* note 155.

²⁷⁰ *See Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893, 895 (9th Cir. 1977) (no error).

²⁷¹ The much-heralded certification procedure, whereby states provide a relatively efficient method for deciding state law issues in *Pullman* abstention cases (*see, e.g.*, FLA. APP. R. 461), is unworkable unless the federal court specifies with precision the unclear question of state law it deems necessary to avoid deciding the federal constitutional question. *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 257, § 4248. *But see* *Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d at 895 ("[S]tate courts are fully capable of making a proper determination of the particular issues that they should undertake . . . to resolve.").

²⁷² *Wilken v. Jones*, Civ. No. 76-2311 (C.D. Cal. Sept. 13, 1976); *Rohm v. Davis*, Civ. No. 75-3523 (C.D. Cal., abstention ordered Oct. 21, 1975; dismissed Nov. 11, 1975).

²⁷³ *See Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 257, § 4242, at 461; *Developments in the Law*, *supra* note 102, at 1255. A contrary attitude seems inherent in the view, not adopted by a majority of the Supreme Court, that state courts should be given a "first chance" to construe statutes attacked on constitutional grounds. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 102 S. Ct. 557 (1981) (Burger, C.J., dissenting); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (Burger, C.J., dissenting).

²⁷⁴ *Wilken v. Jones*, Civ. No. 76-2311 (C.D. Cal., abstention order entered Sept. 14, 1976). The court in *Wilken* stated that the challenged ordinance was "reasonably susceptible to a construction which could cure its apparent overbreadth." *Id.* at 3 (Order of Abstention). The ordinance prohibited the exposure of certain parts of the human body by any waiter,

expressed the hope that a state court would find some limiting construction, without specifying the precise issue upon which it sought a clarifying state ruling.²⁷⁵

The sixth abstention case was dismissed pursuant to *Younger v. Harris* because a proceeding was pending before a state administrative agency.²⁷⁶ At the time, it was (and still may be) a serious, disputed question as to which state administrative proceedings, if any, were covered by the *Younger* rule.²⁷⁷ The district court dismissed the case without alluding to the existence of the issue.²⁷⁸

waitress, or entertainer in any establishment that serves food or beverages, with an exception for any "theater, concert hall, or similar establishment which is primarily devoted to theatrical performance." *Id.* at 7 (quoting RIALTO, CAL. ORDINANCE 704, ch. 9.80.090 (1976)). The court acknowledged that the plaintiff's establishment, a bar with entertainment, could not fit the statute's definition of "theater." Straining a bit, it asserted that the plaintiff's establishment might fit within the exception as a "concert hall, or similar establishment which is primarily devoted to theatrical performance," terms not defined by the ordinance. The same argument undoubtedly could have been made concerning any establishment against which the city sought to enforce the ordinance. If it is to be modified by the type of narrowing construction suggested by the court, the ordinance cannot be so narrowed in a single state proceeding; each establishment must be assessed on the facts of its own operation. This is precisely the type of ordinance that the Court has suggested is not a prime candidate for *Pullman* abstention. See note 273 and accompanying text *supra*.

²⁷⁵ *Rohm v. Davis*, Civ. No. 75-3523, slip op. at 1-2 (C.D. Cal., abstention order entered Oct. 22, 1975); see notes 269-71 and accompanying text *supra*.

²⁷⁶ *Butker v. Department of Alcoholic Beverage Control*, Civ. No. 76-1627 (C.D. Cal. June 16, 1976).

²⁷⁷ See S. NAHMOD, *supra* note 212, § 5.15, at 156-57 & n.161. Without so holding, Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973), seems to assume that some but not all matters pending before state administrative agencies are covered by the *Younger* rule. See generally *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008 (3d Cir. 1981). In *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S. Ct. 2515, 2522 (1982), the Court found *Younger* to be applicable to state bar disciplinary proceedings that (1) constitute state judicial proceedings, (2) implicate important state interests, and (3) provide adequate opportunity to raise constitutional issues.

²⁷⁸ *Butker v. Department of Alcoholic Beverage Control*, Civ. No. 76-1627, slip op. at 2 (C.D. Cal. June 16, 1976) (Order Granting Defendant's Motion to Dismiss). The court's order asserts that the state agency's action was a judicial proceeding, but the case relied on for that proposition, *Francisco Enters., Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), merely states that *state law* considers the Department of Alcoholic Beverage Control to be a state court of limited jurisdiction. 482 F.2d at 485. One would think that invocation of the *Younger* rule would require an independent federal determination of whether pending proceedings are judicial in nature. See generally *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S. Ct. 2515, 2522 (1982). In addition, the state cases that *Kirby* relies upon fall far short of establishing that, as a matter of state law, the Department of Alcoholic Beverage Control is to be treated in all respects as a court. *Kirby* relies on two state cases, *Martin v. Alcoholic Beverage Control Appeals Bd.*, 52 Cal. 2d 238, 340 P.2d 1 (1959), and *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 173 P.2d 545 (1946), in an effort to justify a particular standard of review on appeal from the Department's decisions. *Covert* merely holds that the findings of the Department's predecessor agency are not subject to de novo review in superior court. 29 Cal. 2d at 131, 173 P.2d at 548. Neither case suggests that the Department's proceedings are in all, or even many, respects the equivalent of judicial proceedings. A court that is disinclined to abstain would have had little difficulty in finding a stronger administrative than judicial tone in the Department's activities.

Another use of *Younger*, not mandated by Supreme Court decisions, is its application to

Although these six cases constitute a small sample, they raise questions about judicial attitudes towards cases asserting constitutional rights and about judicial compliance with the oft-quoted statement²⁷⁹ that abstention is the exception rather than the rule. Simple lack of understanding of the abstention doctrines may be a partial explanation. It would be unfortunate if such misapprehension led courts to err only on the side of denying access to federal court.²⁸⁰

2. *Pleadings in Prisoner Cases*

Whether a prisoner's claim proceeds beyond the complaint stage depends largely on the attitude with which the magistrate or district judge views the complaint. Claims that are not frivolous on their faces—and many are not—usually can be construed to allege facts that warrant at least appointing counsel to develop the case. But upon investigation so many prisoner claims prove weak that it is easy to lose objectivity in assessing the merits of their allegations. The conscientious judge who allows cases to proceed beyond the pleading stage may find the claims fabricated or distorted. He then becomes less eager to allow future cases

damages claims. See Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 711-12 (1981). But cf. Fair Assessment In Real Estate Ass'n v. McNary, 102 S. Ct. 177 (1981) (comity precludes damages actions against administration of state taxes). Interestingly, the one prisoner case in the study that relied on *Younger* to dismiss a claim did so when the plaintiffs had requested only damages. See Anderson v. Waters, Civ. No. 75-848 (C.D. Cal., filed Mar. 7, 1975).

²⁷⁹ See, e.g., Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 257, § 4242, at 464.

²⁸⁰ In at least one case filed during the period covered by the study, the Ninth Circuit ruled that the district court erroneously refused to abstain. *Manney v. Cabell*, 654 F.2d 1280 (9th Cir. 1980). In *Manney*, plaintiffs attacked almost every condition of confinement at Central Juvenile Hall in Los Angeles, alleging violations of the California and federal constitutions and of the California Welfare and Institutions Code. *Id.* at 1282. Although plaintiffs failed to obtain relief on most of their claims, the district court found that the overcrowded, unsanitary conditions and the medical-care system violated state and federal constitutional standards and state statutory standards. *Id.* On appeal, the Ninth Circuit, in finding that the district court should have abstained, noted the presence of the two factors it found necessary to justify *Pullman* abstention—a case involving a “sensitive area of social policy” and a potentially dispositive unclear issue of state law, *id.* at 1283—and vacated the district court's judgment. *Id.* at 1283-85.

Manney demonstrates the remarkable flexibility of the *Pullman* abstention doctrine. It is difficult to point to any “clear error” in the Ninth Circuit's reasoning. One might argue that the added delay in a five-year old case was reason enough not to abstain, but *Pullman* abstention has extracted greater time sacrifices from litigants. Yet if *Manney* is viewed as applying *Pullman* correctly, it portends a major shift in the allocation of constitutional litigation between federal and state courts. The factors upon which *Manney* relies probably are present in hundreds of institutional and school desegregation cases that have been litigated in federal court without invoking *Pullman* abstention. State law, usually undeveloped, plays a role in many institutional cases. See Eisenberg & Yeazell, *supra* note 161, at 487-88. State constitutional provisions undoubtedly apply to many forms of school desegregation and, in difficult school desegregation cases, state law might well be deemed unclear. If the reasoning of *Manney* is correct, federal courts may have to decline to adjudicate a large class of cases that they have been adjudicating for over two decades. The ease seems to prove too much.

to proceed, and his decisions dismissing cases rarely receive substantive appellate review. Perhaps for these reasons, federal magistrates and judges in Los Angeles appear to have become less than fully sensitive to prisoner claims. Their inclination to resolve ambiguities in pleadings against pro se litigants is the clearest outward manifestation of this attitude.

The existence of some personal immunity is one common basis for dismissing prisoner complaints.²⁸¹ In the case of executive officials, including the police, the immunity consists of a good faith defense.²⁸² As the Supreme Court made clear in *Gomez v. Toledo*,²⁸³ the defendant must plead the good faith defense. A plaintiff's failure to allege facts that negate the defense is not a basis for dismissing his claim. In about ten percent of the cases, courts relied on the good faith defense or some equivalent formulation in dismissing prisoner complaints,²⁸⁴ but in many of these cases the defendant did not even file a responsive pleading.²⁸⁵ Even when the good faith defense was pleaded correctly, at the time these cases were decided it contained a subjective component that required determining whether the defendant believed he acted constitutionally.²⁸⁶ This subjective standard, recently modified in *Harlow v. Fitzgerald*,²⁸⁷ made it unlikely that the defense should have prevailed solely on the basis of allegations in pleadings.²⁸⁸

The courts' attitude towards supervisory liability also suggests that prisoners' pleadings receive less than sympathetic readings. A narrow view of the pleadings will interpret an action against a wrongdoer's supervisor as an effort to hold the supervisor vicariously liable for the acts of a subordinate. Few courts are willing to hold supervisors liable solely because they have the right to supervise offending subordinates.²⁸⁹ A narrow view of the pleadings therefore effectively terminates the action against the supervisor. A generous view of the pro se pleadings, however, which seems required by the Supreme Court,²⁹⁰ might sometimes preclude such early dismissals of actions against supervisors. Even if supervisors are not liable *solely* because they have the right to supervise,

²⁸¹ See Appendix, Table VII.

²⁸² See, e.g., *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967).

²⁸³ 446 U.S. 635, 640 (1980).

²⁸⁴ Appendix, Table VII.

²⁸⁵ Appendix, Table V.

²⁸⁶ See *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). But cf. *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (summary judgment may be based on qualified immunity); *Barker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981) (summary judgment proper after causes of action and issues have been properly isolated).

²⁸⁷ 102 S. Ct. 2727, 2737-39 (1982) (limiting subjective component of good faith defense).

²⁸⁸ *Schuck*, *supra* note 2, at 325-26.

²⁸⁹ See *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 n.58 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976). See also note 99 *supra*.

²⁹⁰ *Boag v. MacDougall*, 102 S. Ct. 700 (1982) (*per curiam*); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

they may be liable if the failure to supervise is negligent or if other factors establish a nonvicarious connection between the wrongdoer and his supervisor.²⁹¹ A lawyer often should be able to allege sufficient supervisory involvement to survive dismissal on the pleadings of the case against the supervisor. In a pro se complaint, a sympathetic court sometimes will detect such allegations. An unsympathetic court rarely will. The Los Angeles courts never do.

3. *Institutional Cases*

No study of prisoner cases filed under section 1983 would be complete without mention of institutional prison cases in which federal courts play a substantial role in overseeing state penal institutions. The institutional cases raise important questions, but most of those questions relate only tangentially to the issues analyzed here. Although few would argue that institutional cases are overwhelming the courts, some view them as involving federal courts too heavily in the details of prison administration.²⁹² Federal courts, the argument goes, assume tasks for which they are poorly suited and impinge upon state and local government functions.

The 1975-1976 Los Angeles prisoner cases generated at least three institutional cases. These cases reflect a willingness to influence state institutions that is absent from the treatment of individual prisoner cases in the Central District. But willingness should not be confused with eagerness. On their facts, the institutional cases fairly begged for some relief. Moreover, the decisions reflect deference to the needs and status of state officials.²⁹³

The plaintiffs in one such case, *Stewart v. Gates*,²⁹⁴ challenged the policies and practices of the administrators of the Orange County Jail. After three years of litigation, the court, among other things, commended to the defendants "that they give consideration to the likeli-

²⁹¹ See cases cited in note 99 *supra*.

²⁹² Cf. Bator, *supra* note 52, at 635 (separating questions about federal constitutional litigation from questions about institutional litigation). Some criticisms generated by institutional litigation may apply to constitutional litigation on a broader scale. For example, the concern that "trivial" claims are brought in federal court might apply to an institutional case in which a court finds constitutional implications in the minutest details of institutional life. It seems more likely, however, that this "trivialization" process may be attributed to factors other than judicial nitpicking. See also Eisenberg & Yeazell, *supra* note 161, at 475-86.

²⁹³ See *Rutherford v. Pitchess*, 457 F. Supp. 104, 105 (C.D. Cal. 1978) (denying request for more space); *id.* at 110 (requesting further input from parties); *id.* at 111 (denying request for increased length of visits); *id.* (announcing a goal rather than mandating a constitutional minimum); *id.* at 112 (denying relief with respect to indoor recreation); *id.* (approving jail's "trustee" system); *id.* at 114 (requesting that defendants propose a solution to holding-cell problems); *id.* at 117 (refusing to second-guess certain disciplinary actions); *Stewart v. Gates*, 450 F. Supp. 583, 585 (C.D. Cal. 1978) (suggesting that defendants reevaluate mail examination policy); *id.* at 587 (recommending relaxation of limitation on photographs in cells).

²⁹⁴ 450 F. Supp. 583 (C.D. Cal. 1978), *remanded*, 618 F.2d 117 (9th Cir. 1980).

hood, or at least the possibility, that, except in unusual circumstances, outgoing mail need not be examined at all and that incoming mail should be checked only for contraband."²⁹⁵ In addition, it ordered substantial increases in telephone facilities; that each prisoner kept overnight be given a mattress and a bed or bunk upon which to sleep; that prisoners be allowed to receive books, magazines, or newspapers through the mail, subject to inspection; that prisoners be allowed at least fifteen minutes to complete each meal; and that when in bed, inmates be permitted to cover themselves with blankets "provided that sufficient anatomy is exposed to establish the presence of a person."²⁹⁶ Although the conditions that generated these orders did not seem as inhumane as those evidenced in some celebrated institutional cases,²⁹⁷ more than half of the inmates at the county jail are pre-trial detainees.²⁹⁸ Three years of litigation were needed to establish that people convicted of no crime were entitled to a blanket at night and fifteen minutes in which to eat a meal.

The plaintiffs in *Rutherford v. Pitchess*²⁹⁹ brought similar challenges to the conditions of confinement at the Los Angeles County Central Jail. Three years of proceedings before the same judge that heard *Stewart* revealed similar conditions and generated similar relief.³⁰⁰ Most of the inmates at the Los Angeles jail were pre-trial detainees.³⁰¹ *Manney v. Cabell*,³⁰² which challenged almost every condition of confinement at the Los Angeles Central Juvenile Hall, also followed the *Rutherford/Stewart* pattern. On appeal, however, the Ninth Circuit held that the district court should have abstained pending determination by a state court of the plaintiffs' state law claims.³⁰³

Considering these cases in light of the treatment of individual prisoner cases in the Central District offers another perspective on the institutional cases. Institutional litigation, with all its real or imagined difficulties, has clear advantages over individual lawsuits as a technique

²⁹⁵ *Id.* at 585.

²⁹⁶ *Id.* at 590.

²⁹⁷ See Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1349-50 & n.56 (1975).

²⁹⁸ See 450 F. Supp. at 585; letter from Terry Smerling, Esq., counsel for the plaintiffs, to Theodore Eisenberg (Nov. 17, 1981) (on file with the *Cornell Law Review*).

²⁹⁹ 457 F. Supp. 104 (C.D. Cal. 1978).

³⁰⁰ *Id.* at 108-18.

³⁰¹ *Id.* at 108. As often occurs in institutional cases, the proceedings in *Rutherford* have dragged on for years, and portions of it have yet to go to trial. See letter from Terry Smerling, Esq., counsel for plaintiffs, to Theodore Eisenberg (Oct. 30, 1981) (on file with the *Cornell Law Review*). Both the plaintiffs' counsel and the district judge, however, have noted an improvement in conditions at the Los Angeles County Central Jail. See *id.*; *Rutherford v. Pitchess*, Civ. No. 75-4111 (C.D. Cal. Feb. 15, 1979) (Supplemental Memorandum of Decision).

³⁰² 654 F.2d 1280 (9th Cir. 1980).

³⁰³ *Id.* at 1285. See generally note 280 *supra*.

for dealing with objectionable institutional conditions. Individual lawsuits magnify the importance of prisoners' legal skills. Prisoners are poorly positioned to develop the facts necessary to prove allegations, and it is a rare prisoner who can draft complaints and supporting papers that adequately address the relevant legal issues. Moreover, whether a particular prisoner obtains relief will often turn on whether he is aggressive enough to file and successfully pursue a lawsuit. Without counsel, his chances of doing so are minimal. Yet few prisoners can afford counsel and federal courts rarely appoint counsel in prisoners' civil cases.³⁰⁴ In short, individual suits failed in the Central District of California for the reasons that they fail everywhere. Lost in a mass of complaints, the meritorious claims receive the same assembly-line treatment as do all other prisoner claims. The cost of having the system find the meritorious claims is high—a judge cannot order a full hearing in every prisoner's case.

By comparison, institutional litigation allows a single lawyer or team of lawyers to serve an entire institution's population. The institutional approach offers the traditional advantages of class action litigation in a setting in which the class shares common interests and grievances and is unable to obtain adequate individual representation. Institutional cases thrive because many institutions have serious problems and because the traditional alternative, litigation by individual prisoners, has been a failure.³⁰⁵

CONCLUSION

It is ironic that so much discussion of official liability focuses on the theory and reality of section 1983. Although all aspects of state officials' liability for constitutional violations have developed under section 1983, official liability doctrine need not have done so. A decade after *Monroe v. Pape*, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,³⁰⁶ the Court faced the question whether an implied private damages action exists to redress constitutional violations by federal officials. The Court might have had to address the same question with respect to state officials without finding definitive guidance in section 1983.

Section 1983 could have continued on its path of pre-*Monroe* obscurity. The Court might have adopted the historical perspective and limited section 1983 to a narrow class of race-related claims. Or, borrowing from a line of analysis followed in *Brown v. Board of Education*,³⁰⁷ the Court might have acknowledged that it could not turn back the clock to 1871 and deemed the gap between the intent of section 1983's enactors

³⁰⁴ See Appendix, Table V.

³⁰⁵ See also Turner, *supra* note 182, at 653-55 (recommending pattern or practice suits to test prison conditions).

³⁰⁶ 403 U.S. 388 (1971).

³⁰⁷ 347 U.S. 483 (1954).

and modern problems too wide to construe section 1983 to address specific modern official liability issues. For whatever reason, a narrow reading of section 1983 would have required the Court to address the question whether there is an implied private right of action to redress constitutional violations by state officials.³⁰⁸ An affirmative answer would have rendered section 1983 little more than a historical footnote. All cases asserting constitutional violations would then have been *Bivens* actions.

Would official liability law have developed differently if a *Bivens*-type case, rather than section 1983, were the prime moving force? One immediate difference rests in the potential liberation from the guidance the Court claims the legislative history of section 1983 offers. For example, under an implied right of action, the court would have had to face the issues of municipal immunity and *respondeat* liability without misleading historical props.

More importantly, there might have been a shift in our way of thinking about the law of constitutional remedy. Today, one can delude oneself into thinking about the law of constitutional remedy as an abstraction distinct from the details of section 1983 doctrine. For example, it is common to hear discussion of section 1983 cases as trivializing the Constitution or overwhelming the federal courts. One may advocate restricting section 1983 without necessarily conceding a desire to restrict the Constitution. If section 1983 were eliminated as an intermediary between constitutional violations and remedies for those violations, this misleading mode of thought would become less tenable.

Interestingly, the current fascination with the number of section 1983 cases may contribute to the same misleading mode of thought about the law of constitutional remedy. As long as attention focuses on whether there are too many section 1983 cases, one need not focus on the larger question of what the law of constitutional remedy should be. If the crushing caseload that section 1983 is thought to generate turns out not to be quite so crushing, those relying on the caseload to shape section 1983 may reassess their views. For example, those who view the number of section 1983 cases as justifying an exhaustion of remedies requirement must reassess whether the same position can be supported without relying on the numbers. Even if there are "too many" section 1983 cases, we would have to decide whether the attendant problems are tolerable in light of the protections afforded constitutional rights. The numbers game provides a convenient distraction from the underlying issues.

³⁰⁸ The Court may yet have to decide this question. Lower courts sometimes find that *Bivens* actions against city or state officials do not encounter the impediments to actions brought under § 1983. See *Rhodes v. City of Wichita*, 516 F. Supp. 501 (D. Kan. 1981) (*respondeat superior* liability in *Bivens* action against city; *Monell* held inapplicable).

APPENDIX

TABLE I
Disposition of Nonprisoner Section 1983 Cases: 1975

	Trial	Settlement	Stipulated Dismissal	Dismissal By Plaintiff	Dismissal-Lack of Prosecution	Other Dismissal	Defendant's Summary Judgment	Plaintiff's Summary Judgment	Abstention	Unexplained, Pending & Other	Totals
False Arrest	3 ^a	6	4	4	6	4				1	27
Assault, Battery, Shooting, etc.	2	3	3	2	5	1	1				17
Search, Seizure, Harassment	1	3	3	2	1	6			1		17
Malicious Prosecution	1			1		2					4
Judicial Error or Misconduct						13	2				15
First Amendment Claims		2 ^b	3			3	1		2		10
Employment Discrimination	1	7	3			3	2	1			17
Other Discrimination		1	1	3		1	1				7
Due Process		2		1	1	3	2		1		10
Tax Disputes						2	2				4
Child Custody						1	2				3
Miscellaneous		2	1			5			1		9
Totals	7	25	18	13	13	44	13	1	5	1	140

a. Includes one case that was later settled and is counted once in arriving at totals.

b. Includes one case that was settled after trial commenced, was later dismissed by stipulation, and is counted once in arriving at totals.

TABLE II

Disposition of Nonprisoner Section 1983 Cases: 1976

	Trial	Settlement	Stipulated Dismissal	Dismissal By Plaintiff	Dismissal-Lack of Prosecution	Other Dismissal	Defendant's Summary Judgment	Plaintiff's Summary Judgment	Abstention	Unexplained, Pending & Other	Totals
False Arrest	2	5		2	8	4				2	23
Assault, Battery, Shooting, etc.	1	5	5		7	1				2	21
Search, Seizure, Harassment	1	2	4	1		4					12
Malicious Prosecution						1	1				2
Judicial Error or Misconduct						3					3
First Amendment Claims	2	1				5			3		11
Employment Discrimination	3	3	2			1	2			1	12
Other Discrimination		3	2	1		4					10
Due Process	1 ^a	2	1	1	1	10	1		3	3 ^b	23
Tax Disputes											
Child Custody						1					1
Miscellaneous				1	3	11	2			1	18
Totals	10	21	14	6	19	45	6		6	9	136

a. Injunctive relief also granted.

b. Includes two cases in which partial relief (injunctive) was granted.

TABLE III

Litigation Progress of Nonprisoner Section 1983 Cases: 1975

	Number of Cases	Answer	Hearing	Deposition	Interrogatories	Magistrate's Report	Pretrial Conference	Trial
False Arrest	27	20	6	5	11	4	2	3
Assault, Battery, Shooting, etc.	17	10	8	6	9	2	2	2
Search, Seizure, Harassment	17	9	2	4	8	4	1	1
Malicious Prosecution	4	2	1		2	2	1	1
Judicial Error or Misconduct	15	3	2			12		
First Amendment Claims	10	4	3	3	3		2	
Employment Discrimination	17	14	8	7	9		1	1
Other Discrimination	7	4	1	1	3	2		
Due Process	10	5	3	1	2	2		
Tax Disputes	4	2			1	4		
Child Custody	3		2	1	1	1		
Miscellaneous	9	3	3	2	2	5		
Totals	140	76	39	30	51	38	9	8

TABLE IV

Litigation Progress of Nonprisoner Section 1983 Cases: 1976

	Number of Cases	Answer	Hearing	Deposition	Interrogatories	Magistrate's Report	Pretrial Conference	Trial
False Arrest	23	12	5	5	6	3	5	2
Assault, Battery, Shooting, etc.	21	12	4	7	12	5	4	1
Search, Seizure, Harassment	12	9	3	2	4	1		1
Malicious Prosecution	2	2	1		1	1		
Judicial Error or Misconduct	3	1				3		
First Amendment Claims	11	5	5	1	2	1	1	2
Employment Discrimination	12	11	4	2	5		1	3
Other Discrimination	10	2	1	1	2	3		
Due Process	23	7	10	5	5	7	3	1
Tax Disputes						-	-	
Child Custody	1					1		
Miscellaneous	18	8	4	3	4	8		
Totals	136	69	37	26	41	33	14	10

TABLE V

Litigation Progress and Disposition of Prisoner Section 1983
Cases Not Summarily Dismissed: 1975 & 1976

	1975 125 Cases Filed	1976 87 Cases Filed
Settlement	0	1
Trial	3	0
Answer	14	11
Hearing	3	7
Deposition	4	1
Interrogatories	12	7
Attorney Represented Prisoner	8	5
Pending or Unexplained	2	0

TABLE VI
Nature of Prisoner Section 1983 Claims 1975 & 1976

	1975 125 Cases Filed	1976 87 Cases Filed
Prison Conditions		
guard harassment	9	3
medical treatment	18	10
withholding property	9	2
mistreatment by other inmates	3	3
searches	2	2
punishment, disciplinary proceedings	18	9
conditions generally	6	1
overcrowding	3	1
interference with mail	6	6
interference with religion	2	0
Prior Legal Proceedings		
legal representation	7	5
false arrest, assault, search & seizure	11	7
judicial, clerical, or prosecutorial misconduct	6	11
false testimony	1	4
Parole, Probation, Sentencing, Detainers		
matters pertaining to probation or parole	22	6
detainers, transfer, or transport	6	7
sentencing practices or computation	3	3
miscellaneous release claims	6	1
Access to Courts	11	10
Miscellaneous Claims	13	13

TABLE VII

Common Bases for Dismissing Prisoner Section 1983 Claims:
1975 & 1976

	1975 125 Cases Filed	1976 87 Cases Filed
Exhaustion of Remedies	15	8
Good Faith Defense	15	9
Judicial or Quasi-Judicial Immunity	15	5
Municipal, Entity, or State Immunity	7	10
Not Under Color of Law	15	6
No Cause of Action or No Constitutional Violation	15	8
Prosecutorial Immunity	6	1
No Respondeat Superior Liability	24	4
Res Judicata	2	1
Deference to Prison Officials	9	1
Lack of Prosecution	10	12
Statute of Limitations	3	1
Defective Pleadings	8	11

TABLE VIII

Survival Rate of Nonprisoner Cases to Initial Final Disposition By District
Court (Figures Exclude Post-Appeal Dispositions)

Time Elapsed From Initial Filing	Percentage of Cases Surviving		
	1975	1976	1975-6
6 Months	70.7%	60.3%	65.6%
12 Months	42.9	38.2	40.6
18 Months	20.0	25.0	22.5
24 Months	15.0	19.1	17.0
30 Months	7.9	13.2	10.5